United Nations A/C.6/52/SR.23

General Assembly
Fifty-second session

Official Records

Distr.: General
5 December 1997
English
Original: French

Sixth Committee

Summary record of the 23rd meeting
Held at Headquarters, New York, on Thursday, 6 November 1997, at 3 p.m.

Chairman: Mr. Tomka ..... (Slovakia)

Contents

Agenda item 147: Report of the International Law Commission on the work of its forty-ninth session (*continued*)

This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of publication* to the Chief of the Official Records Editing Section, room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

97-82607 (E)

The meeting was called to order at 3.10 p.m.

Agenda item 147: Report of the International Law Commission on the work of its forty-ninth session (*continued*) (A/52/10)

1. **Ms. Gao Yanping** (China) recalled, with regard to State responsibility, that the International Law Commission (ILC) had completed its first reading of the draft articles the previous year, after 40 years of effort. Her delegation was pleased with the Commission's decision to finish the second reading before the end of the current quinquennium. In view of the difficulties and urgency of the task, her delegation agreed that the Commission should make the topic a priority.

2. Successful completion of the second reading depended on appropriate handling of three issues. First of all, the issue of "State crime" and its legal consequences was problematic. Her delegation had stated repeatedly that the establishment of such a concept in international law would encounter almost insurmountable difficulties, given the maxims *par in parem non habet imperium* and *societas delinquere non potest*. It would be impracticable to determine and impose punishment for a "State crime" within the international community as currently structured. Draft article 19 on "State crimes", and the draft articles on their legal consequences in Part Two of the draft articles, should therefore be amended.

3. Secondly, it was necessary to take countermeasures against internationally wrongful acts. However, even if the entitlement of the injured State to take countermeasures was recognized, such countermeasures should be subject to certain restrictions. Although the draft articles in their current form were basically satisfactory in that regard, some problems remained. For example, while the injured State might consider the freezing of assets and the suspension of permission as interim measures of protection, the wrongdoing State might interpret such steps as countermeasures and unilaterally resort to arbitration. If the wrongful conduct ceased during the process of arbitration, the injured State should suspend its countermeasures. Issues such as the precise meaning of the term "interim measures of protection" would therefore need to be clarified during the second reading.

4. Thirdly, the provisions relating to settlement of disputes adopted in first reading were too rigid and lacked relevance and flexibility. The parties to a dispute should be allowed freely to choose the means of settlement. Her delegation agreed that the issue of settlement of disputes should be dealt with in the draft articles on State responsibility, but felt that, given the close linkage between settlement of disputes and countermeasures, the articles on means of settlement could be merged into a single article in the chapter on countermeasures.

5. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, she agreed with the Working Group's analysis of the 22 draft articles annexed to the Commission's previous year's report (A/51/10) and its comments on the direction of future work on the topic. "Prevention" and "liability" were the two major issues dealt with in the draft articles. Once it had adopted the draft articles relating to "prevention", the Commission would endeavour to complete its first reading of the draft articles over the next few years.

6. Article 1 defined the scope of the draft articles, namely, activities not prohibited by international law which involve a risk of causing significant transboundary harm. State responsibility would arise from the occurrence of harm if the State failed to implement the obligations set out by the draft articles on prevention while engaging in activities of that nature. On the other hand, if the State fulfilled its obligations under the draft articles and harm still occurred, that would give rise to "international liability", which was the core issue. As soon as the Commission completed its first reading of the draft articles on "prevention", it should proceed to the issue of "liability". The decision on whether there was a need to adjust the title of the topic should be made in the light of the content of the draft articles.

7. Diplomatic protection was a new topic which touched upon very complicated issues. When a legal person, such as a corporation, requested diplomatic protection, claims for compensation were usually brought by the State of nationality on behalf of the legal person. However, given that corporations, particularly multinational corporations, tended to have very complex structures, it could be extremely difficult to apply the rules of nationality in the context of a claim for compensation or other international laws to them. In accordance with international customary law, diplomatic protection should be invoked only after local remedies had been exhausted, and when it was invoked, State sovereignty and jurisdiction should be fully respected. Otherwise, aliens might actually enjoy privileges in their relationship with the host country and might be able to secure diplomatic interference at an unduly early stage by requesting their State of nationality to exert political pressure immediately, thereby jeopardizing the host State's sovereignty and judicial powers over persons under its jurisdiction.

8. Her delegation had taken note of the exceptions and alternative international remedies provided for in the general outline of the topic, including the right of recourse to human rights treaty bodies and to international tribunals competent in the field of foreign investment. Nevertheless, according to article 41, paragraph 1 (c), of the International Covenant on Civil and Political Rights, the Committee responsible for monitoring the Covenant could deal with a matter referred to it only after it had ascertained that all domestic remedies had been invoked and exhausted, in conformity with the generally recognized principles of international law. Again, on the issue of recourse to arbitration to settle investment disputes, although certain States might conclude arbitration agreements in that regard, that did not mean that the generally applicable principle of exhaustion of local remedies would automatically be put aside. On the contrary, all local administrative and legal remedies should be exhausted before resorting to arbitration. Explicit provision should be made for that principle.

9. Her delegation endorsed the analysis made by the Working Group of the Commission on the advisability and feasibility of considering the topic of unilateral acts of States. In international relations, States often carried out unilateral acts with the intent to produce legal effects. State practice in relation to unilateral legal acts was manifested in many forms and circumstances and there was sufficient material for the Commission to analyse and codify. Her delegation was in favour of changing the title to "unilateral legal acts of States". That would help to allay any fears that the major Powers might seek to secure recognition of their own unilateral acts. Consideration of the topic would help to clarify the functioning and legal consequences of such acts and thus strengthen the rule of law and bring certainty and stability to international relations. The focus should be on unilateral legal acts of States; unilateral acts of international organizations could be included in the Commission's long-term programme of work as a possible subject for future study.

10. **Ms. Škrk** (Slovenia) said that her delegation fully supported the conclusions of Mr. Pellet, Special Rapporteur on reservations to treaties, and further believed that the achievements of the Vienna regime should be preserved and given the value of international customary law. The regime had been envisaged as having universal applicability and there was therefore no need to establish a special regime for normative multilateral treaties, including human rights conventions.

11. In considering the permissibility of reservations, a delicate balance needed to be struck between the compatibility of a reservation with the object and purpose of a treaty and the consensual nature of the instrument. That balance was clearly difficult to achieve. The Special Rapporteur had obviously been guided by the principle of free consent in his assessment of the competence of human rights monitoring bodies; in his view, the primary role of those bodies was to monitor compliance with a treaty, although they might be accorded jurisdictional powers (the European Court of Human Rights) or a purely consultative mandate.

12. Her delegation agreed with the Special Rapporteur that it was essentially for States Parties to human rights treaties to decide whether they wished to continue to be Parties to a treaty and accordingly amend or suspend a disputed reservation, or whether they wished to denounce the treaty. The Preliminary Conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties, which had been adopted by the Commission, substantially reflected the views expressed by the Special Rapporteur in his second report. They therefore offered a good starting point for further discussion of that complex issue. The Commission had invited monitoring bodies established pursuant to human rights treaties to submit their comments on reservations to those treaties. That invitation was in accordance with the Statute of the Commission and in line with several recommendations that had been made during the Colloquium on the Codification and Progressive Development of International Law to the effect that the Commission should cooperate more closely with other bodies.

13. Her delegation welcomed the appointment of Mr. James Crawford as Special Rapporteur on State responsibility and was pleased to note that the Commission would begin the second reading of the draft articles on that subject at its next session. One of the key issues was how to define international crimes and delicts as embodied in article 19. In previous statements to the Sixth Committee, her delegation had supported the Commission's two-stage approach to dealing with the problem of acts of States which constituted a breach of an international obligation. It seemed unlikely that all breaches of international law could be treated on an equal footing, since certain acts could undoubtedly have more serious illegal consequences than others and could harm the interests of many States or, indeed, of the international community as a whole. Her delegation was fully aware of the practical and theoretical issues surrounding the distinction between international crimes and international delicts, including the question of the identification of a State injured by an international crime and the question of which State had the right to take *locus standi* at an international judicial body. It had to be admitted

that illegal acts which were defined by the Commission as international crimes did not necessarily affect the interests of all States with equal severity. The Commission should therefore re-examine the whole issue of international crimes and delicts with great prudence and care, taking into account the comments of Governments and international legal doctrine, which had, to a certain extent, expressed views on that sensitive issue. It was premature to take a firm position on countermeasures elaborated by the Commission, since the present system was based on the distinction between international crimes and delicts and was therefore contingent on the future definition of international crimes. Her delegation believed that, at the current stage, the Commission should preserve part three of the draft articles, concerning the settlement of disputes.

14. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, the Commission's approach, whereby it would first address the issue of prevention of transboundary damage from hazardous activities, seemed reasonable. However, it would be regrettable if the Commission did not continue its work on liability for hazardous activities with transboundary effects as a corollary to the legal regulation of the prevention of such activities.

15. Her delegation had initially supported the inclusion of the topic of diplomatic protection in the Commission's programme of work, since there was a growing practical need to codify international law in that area. The Commission had adopted a suitably rigorous approach in its report and had wisely decided to limit the topic to codification of secondary rules. However, some important aspects needed to be highlighted.

16. Firstly, the development of contemporary human rights law had inevitably altered traditional notions of diplomatic protection, although, on the international level, diplomatic protection should still be viewed primarily as the right of a State, not of an individual. The Commission should explore the subject carefully, including the legislative practice of States which already attributed the right of diplomatic protection to their nationals on the basis of domestic legislation. Another question which required detailed examination, one which the Commission had already raised, was whether a State could afford diplomatic protection to one of its nationals against a State whose nationality such person also possessed. The Commission could also add refugees to the list of persons requiring diplomatic protection, as they did not need to meet the criteria, such as long residence in the State espousing diplomatic protection, nor did they need to fit into the categories of persons established by the Commission.

17. As international trade relations expanded, the Commission needed to make a careful study of effective link criteria for determining the nationality of legal persons. Its initial approach to that issue seemed satisfactory.

18. With regard to diplomatic protection by international organizations, her delegation believed that since the number of international, regional and governmental organizations had grown immensely in the past decade, the functional diplomatic protection of those organizations formed an important part of contemporary diplomatic protection. However, it would be preferable for the Commission to complete its work on diplomatic protection by States before undertaking the study on the diplomatic protection exercised by international organizations.

19. The topic of unilateral acts of States was appropriate for the codification and progressive development of international law and should therefore be included on the agenda of the Commission. Slovenia agreed with the general approach taken by the Working Group, including the scope and content of the study to be undertaken. Obviously, the legal framework adopted by the Commission for unilateral acts had been inspired by the two Vienna Conventions on the Law of Treaties. One aspect of the classification of unilateral legal acts of States, namely, interpretive declarations, needed careful examination. Such declarations were becoming more frequent in treaty relations, and, while the Commission had already addressed that question under reservations to treaties, the notion and characteristics of interpretive declarations should be studied within the framework of unilateral acts of States. It was for the Commission to decide to what extent it would deal with those declarations as reservations and to find a way to accommodate them properly between reservations to treaties and unilateral acts of States.

20. **Mr. Loras** (France) said that he wished to add to the comments made by the French delegation the previous week. With regard to State responsibility, each State had been invited to submit comments in writing on the draft articles submitted by the Commission, and France would soon be submitting its comments on the topic. Therefore, he would limit his remarks to a few matters of principle that his delegation viewed as fundamental.

21. The general approach taken in the draft articles raised several problems. France had regularly stated before the Sixth Committee that the existence of damage was an essential element in the determination of State responsibility and that it was an integral part thereof. It had always been critical of the idea that a breach of an obligation, which was

poorly defined in the draft articles, would be sufficient to entail State responsibility.

22. The French delegation had also criticized several times the concept of "international crime" as defined in draft article 19, as well as the distinction between international crimes and delicts. It was difficult to deny that some illicit acts were more serious than others, but the distinction which the Commission had made between crimes and delicts was vague and unworkable. The Commission had also made little use of the distinction which it had established.

23. The expression "injured States", found in article 40, was ambiguous, and there again the emphasis should be placed on the concept of "damage".

24. As for the provisions regarding countermeasures, they were out of place in the draft. It was not clear that it was necessary to speak of countermeasures in a draft on State responsibility, since a text on responsibility should only include matters pertaining to that subject. The countermeasures regime could in itself justify a separate study by the International Law Commission.

25. France believed that the provisions on settlement of disputes were inappropriate. The third part of the draft had the effect of instituting a jurisdictional settlement of all disputes. However, there was no reason to single out disputes arising from questions of responsibility by applying an ad hoc dispute settlement mechanism to them. Moreover, most of the time there were no isolated disputes on responsibility, but rather substantive disputes with consequences in the area of responsibility. The third part was therefore inappropriate by definition. France did not see why there should be a specific dispute settlement mechanism linked to responsibility. It would be preferable to refer those matters to general international law. One solution would be to make the third part indicative, if not to delete it. It could then take the form of an optional protocol.

26. **Ms. Wong** (New Zealand) said that her delegation supported the suggestion of the Chairman of the International Law Commission that the Sixth Committee should hold informal meetings at its 1998 session to consider the topics addressed by the Commission. It also welcomed the fact that the Commission had focused on such questions as its cooperation with other bodies concerned with international law. Article 26, paragraph 2, of the Commission's statute stipulated that Commission documents should be distributed to international organizations concerned with international law and to at least one organization in each Member State. Article 26, paragraph 1, stated that the Commission could consult with any international or national organization on any subject entrusted to it. Those provisions could and should be implemented.

27. With regard to State responsibility, her delegation welcomed the work plan for consideration of the topic and the appointment of the Special Rapporteur. The topic of State responsibility was of fundamental importance, and the principles contained in the draft articles had already had a major impact on State practice, particularly article 4, which stipulated that the characterization of an act of a State as being wrongful in international law could not be affected by the characterization of that act as lawful by national law. That text was having an impact in the negotiations on a convention against terrorist bombing. The final form of that work could be either a treaty or a code.

28. The field of international liability for injurious consequences arising out of acts not prohibited by international law was constantly evolving and had major significance at the dawn of the twenty-first century. In the modern world, the failure to prevent damage to the environment could have serious consequences. Everyone was currently aware that the world did not have an inexhaustible supply of natural resources and that sustainable development must be promoted. Those who contributed to the codification and progressive development of international law in that field could not neglect the issue. The Working Group of the Commission had made significant progress on that topic in 1996, which had resulted in a set of draft articles on prevention. States had the obligation to prevent transboundary harm and to minimize risk, in particular through environmental impact assessments. Future work on the topic, however, should not be confined to prevention. If there was harm, there must be compensation. The polluter must pay. At its forty-ninth session, the Commission had decided to deal separately with the issues of prevention and international liability, but both aspects of the topic were equally important. By studying each with the same degree of care, the Commission would demonstrate that it was a modern organization prepared to take up the challenges of the twenty-first century.

29. **Mr. Cede** (Austria) said that his delegation had been pleased to learn that the Commission had established a working group on State responsibility, as the work on that subject should be finalized as soon as possible. The final results of that work could take the form of an international convention; however, a more flexible instrument, such as a guide for State practice, would also be possible. As for the content of the draft articles, the Commission had requested comments on such key questions as countermeasures and dispute settlement and for any lacunae in the draft to be identified. In the view of his delegation, the current draft was

already too comprehensive and, on the contrary, required some pruning. In particular, certain controversial provisions should be removed because they risked endangering acceptance of the draft. The third part of the draft could even be deleted.

30. When it revised the draft articles, the Commission should take care to avoid legal terms such as "fortuitous event", the scope of which had not yet been sufficiently determined by State practice. Since the aim was to prevent conflict between States, unclear legal terms that could promote controversy should be avoided. However, his delegation was generally satisfied with the overall approach, particularly of Part One, and with the general structure of the draft articles, with the exception of some specific provisions.

31. The draft articles in Part One, chapter II, which referred to the attribution of "acts of the State" under international law, seemed in general to be skilfully drafted. However, doubts remained as to whether the provisions of chapter II sufficiently covered the acts of natural and juridical persons who, at the time they committed a violation of international law, did not act as State organs but nevertheless acted under the authority and control of the State. Since States increasingly tended to entrust persons outside the structure of State organs with activities attributable to the State, a question arose as to whether the criteria established in chapter II for determining acts attributable to the State were too narrow. Answering that question would require a more thorough examination of recent State practice.

32. The issue of the conduct of organs of an insurrectional movement, contained in articles 14 and 15, left considerable doubt, particularly with regard to the provision in article 15, paragraph 1, concerning the attribution of acts of an insurrectional movement to a State. The relationship between the first and second sentences of that provision could produce curious results; for example, with respect to the events in Bosnia and Herzegovina, the application of that provision would make that State responsible both for its own acts and for the acts of the separatist movement currently represented in the Government pursuant to the Dayton Agreement. On the other hand, the experience gained in the wake of the breakdown of the iron curtain, in the former Yugoslavia and in other cases of civil unrest, should be studied with a view to the possible reformulation of those articles.

33. With respect to international crimes, his delegation continued to believe that little could be gained from such a notion in the context of State responsibility. It still preferred to delete article 19 and the provisions on the consequences thereof, which were contained in articles 51 to 53. If the General Assembly adopted such articles, it would run the risk of making the whole set of provisions on State responsibility less acceptable. Abuse of the notion of international crimes might, in practice, provide tempting pretexts for imposing disproportionately severe countermeasures and sanctions for even minor violations of international law. The notion of international delicts had no special importance, since any violation of international law entailing the responsibility of a State technically constituted a delict. The Commission should instead take a new approach to regulating the legal consequences of violations of international law, taking into account the seriousness of the violation and its sustained negative effects. In that regard, the possibility of seeking punitive damages should be studied on the basis of existing State practice.

34. In general, Austria preferred the "objective" approach taken in other areas of the draft articles, and felt that elements of domestic criminal law, including wilful acts, were out of place in the regulation of the legal relations between States. Any approach to State responsibility should never disregard the long-standing practice of the international community concerning measures which the latter could take under Chapter VII of the Charter of the United Nations, particularly with regard to violations of international law which threatened international peace and security. Moreover, State practices, including the efforts to establish an international criminal court, which were aimed at the prosecution of individuals, including State organs, that had committed criminal acts could provide a more effective tool against grave violations of basic norms of international law, such as human rights and humanitarian standards, than the criminalization of State conduct as such.

35. With respect to Part One, chapter V, which dealt with circumstances precluding wrongfulness, some States might have doubts about the practical relevance of article 29, paragraph 2, which excluded consent as a circumstance precluding wrongfulness in the case of *jus cogens*.

36. Article 31 also required more work; its current wording, which mixed objective and subjective elements, blurred the scope of *force majeure* or other external events as circumstances precluding wrongfulness. Austria therefore asked the Commission to consider to what extent the concept of material impossibility could be further developed so as to replace the notion of fortuitous events as a circumstance precluding guilt. The problems addressed by article 31 had far-reaching consequences that could relate to issues such as due diligence as a key element of the concept of prevention. Moreover, article 35 should be reformulated. To

the extent that it pertained to liability for acts performed in conformity with international law, its wording should be more specific, because otherwise it could undercut the effect of circumstances precluding wrongfulness. A provision applying the exception under article 35 only to such acts for which international law provided a legal ground for compensation would suffice. It must be borne in mind that the rules of international law governing liability and the duty to prevent damages still required extensive work by the international community.

37. With respect to Part Two, chapter I, the concept of an "injured State" developed in article 40 had merit to the extent that States were directly affected in their rights by violations of international law. The entitlement of a State to obtain reparation, restitution in kind or compensation should be made entirely dependent on whether that State had been directly affected in its rights by the violation. However, there was doubt as to whether the concept was also workable in cases where no directly affected State could be identified, such as the case of human rights violations and breach of obligations owed to the community of States as a whole. His delegation felt that the content of draft article 40, paragraph 2, subparagraphs (e) and (f), and paragraph 3, should be dealt with separately. The concept chosen in article 40 could lead to a competitive or cumulative competence of States to invoke legal consequences of a violation of international law. That could lead to absurd results, given the absence of a world authority to decide on the competence of States to invoke violations *erga omnes*. The right of States to invoke such violations should therefore be limited to specific legal consequences, such as the obligation to cease wrongful conduct or the satisfaction of the victims of violations of international law. Such a limitation on the competence of States seemed all the more preferable as the ability of the community of States, under existing international legal procedures, to react to violations of international law with effect *erga omnes* would remain unaffected by the rules governing State responsibility. In the case of violations *erga omnes*, certain problems must be addressed, such as the right of several States to invoke such violations concurrently and the legal consequences of the exercise of that right by one State for the rights of the other States concerned. Therefore, his delegation strongly urged the Commission to revise article 40 and Part Two, chapter II, of the draft articles.

38. Regarding chapter III of Part Two on countermeasures, it was necessary to improve the procedures stipulated in the provisions. His delegation welcomed the fact that its point of view concerning the obligation of the injured State to attempt to settle a dispute prior to taking countermeasures had been reflected in the reformulated version of article 48, paragraph 1. Nevertheless, given the general reluctance of States to submit to obligatory procedures for settling disputes, his delegation still had doubts about the efficiency of the proposed system. In the case of State responsibility, there was a danger that dispute settlement procedures, particularly those of a binding nature, might not work in practice. The question arose, therefore, as to whether the draft articles should be omitted from Part Three altogether. The procedure in article 48 on the obligation to negotiate could be retained, and a reference to dispute settlement procedures applicable between the injured and the wrongdoing State which already existed under international law could be inserted. As radical as such an approach might seem from a dogmatic point of view, it seemed to square with the direction followed by States in practice.

39. In taking such a realistic approach, the element of proportionality seemed to be of crucial importance. The principle of proportionality admittedly remained undetermined by international judicial authorities in terms of its scope, but it could not be denied that the mere fact that its invocation by a State against which countermeasures had been taken already provided a regulating effect. Furthermore, the jurisdiction of the International Court of Justice, particularly its advisory opinion on the legality of the use or threatened use of nuclear weapons, revealed the importance of that principle. The Commission might therefore further refine the provision on proportionality, at least in the commentary to the conclusive set of draft articles.

40. Whatever the result of the ongoing efforts to codify the rules of international law on State responsibility, an effort should be made to realize the following three objectives. First, the rules on State responsibility should play a decisive role in resolving international conflicts. They should help to influence State behaviour by minimizing instances which could develop into serious conflicts among States. Second, given the long history of the Commission's efforts to codify rules on State responsibility, an early conclusion of the work on that topic should receive high priority. The draft articles and the system adopted, with the exception of the elements mentioned above, provided an excellent basis, and hence new and complicated elements should not be introduced into the draft. Third, a flexible approach should be taken as far as the format of a future instrument on State responsibility was concerned, since all rules on State responsibility touched upon the basis of international law and should therefore strengthen it. The rules on State responsibility should therefore be set forth in the form of an instrument

restating the relevant rules of international law rather than in the form of an instrument requiring ratification by States.

41. Regarding chapter VII of the report, dealing with international liability for injurious consequences arising out of acts not prohibited by international law, the Commission, in deciding to separate its study of prevention from that of liability in the true sense, had opted for an approach which on the one hand seemed fully justified and, on the other, had various far-reaching consequences. It could not be denied that the two matters, international liability and prevention, were connected only indirectly, and it was justifiable to separate them for a number of reasons. Irrespective of whether liability constituted a primary or a secondary norm, it defined the consequences resulting from damage caused by activities which were lawful under international law. In that respect, reference could be made to draft article 35 on State responsibility, a link which was also reflected in the commentary on that provision. However, the draft on liability also included rules that were purely primary in scope, for example those concerning prevention, the violation of which would not entail liability but did fall within the sphere of State responsibility. It was therefore incorrect to combine prevention with a liability regime in the same draft unless a clear conceptual distinction was made therein. A separation of the two issues was also warranted on the grounds that they often dealt with different spheres of activity: prevention addressed almost all dangerous activities. Thus, Principle 21 of the Stockholm Declaration, which the Commission had already recognized as constituting existing law, did not distinguish different categories of activities. In contrast, it seemed appropriate to provide a liability regime only for those activities which were considered indispensable despite their dangerous nature. Such a regime would stipulate that damage which occurred despite precautionary measures need not be defrayed by society but should be compensated by the author of the damage. It was only in that way that the prevention and liability regimes were connected.

42. Concerning work on prevention, his delegation favoured a procedure under which the parameters and ramifications of prevention in international law would first of all be clarified and then assessed against the relevant draft articles already elaborated by the Commission. In that regard, it was impossible to ignore the difficulties of defining "hazardous acts" which would determine the scope of the provisions. At the same time, however, it was important not to lose sight of the original task, namely the elaboration of a regime of liability *stricto sensu*.

43. With regard to chapter VIII of the report, on diplomatic protection, his delegation appreciated the decision to focus the work on secondary rules. At the same time it was indeed evident that only indirect injury was concerned because, if a State suffered direct injury, it no longer invoked diplomatic protection but demanded reparation. Hence, the issue bore directly on the link between States and their nationals; interesting questions would have to be answered if such a link could not be invoked, as in the case of diplomatic protection by international organizations for their agents or by States on behalf of foreigners, either according to general international law or by agreement. With regard to the content of the topic as outlined in paragraph 189 of the report, with which his delegation was broadly in agreement, the only query was whether the "clean hands" rule quoted in chapter III A could really be regarded a generally accepted principle. However, the outline was only tentative and would certainly be reviewed in the light of comments made thereon.

44. The parameters of chapter IX, on unilateral acts of States, were not very clear to his delegation. The Working Group which had studied the topic had rightly pointed out that unilateral acts formed the basis of the diplomatic activity of States. International relations were to a great extent the result of such acts, and the imperatives of peaceful international coexistence, predictability and stability required that such acts should produce some legal effect. However, the work should be confined only to those acts whose main purpose was to produce legal consequences, since otherwise the concept would be practically indefinable. Moreover, the unilateral acts of international organizations should not be dealt with, and the same was true of acts connected with treaties since they were mostly governed by the law of treaties or the regime of the specific treaty. The topic was not an easy one, given that legal concepts such as recognition or promise themselves needed to be analysed in detail. It could even be queried whether the categories of unilateral legal acts enumerated in Chapter III of the outline had sufficient elements in common to enable them to be treated alike. Such questions should not deter the Commission from continuing its work, but in light of the difficulties his delegation welcomed the Commission's decision not to make a pronouncement on the final outcome, which might even take the form of a doctrinal study.

45. **Mr. Gray** (Australia) welcomed the progress made by the Commission in its consideration of the issue of the nationality of natural persons in relation to the succession of States. As a nation of immigrants, many of whom had dual nationality, Australia followed with interest the Commission's debate on the rules applicable in that area, which would add to the existing body of international legal rules aimed at preventing statelessness. He would submit his

Government's comments and observations on that topic to the Commission by January 1999.

46. On a related issue, he welcomed the proposed schedule of work on diplomatic protection. In his view, it was important to define diplomatic protection, a term of art whose scope was somewhat unclear. To that end, the Commission should examine, in the preliminary stages, the distinction between the diplomatic protection exercised by a State in espousing the cause of its nationals where local redress had been exhausted, which was the subject of the Commission's study, and the other forms of protection afforded by diplomatic missions. Circumstances might arise in which the exercise of diplomatic or consular functions of assistance and protection provided in accordance with the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations might be viewed by the host Government as an exercise of diplomatic protection, and, in cases of dual nationality, as being contrary to article 4 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws.

47. He welcomed the Commission's decision to examine the situation of customary international law relating to diplomatic protection in cases of multiple nationality and to determine whether article 4 of the Hague Convention was still applicable, since it might prevent a State from rendering consular assistance to one of its nationals in the other State whose nationality such person also possessed.

48. On the question as to whether the topic should cover forms of protection other than claims, he wondered whether article 4 of the Hague Convention might prevent a State from making diplomatic representations or exercising consular protection in circumstances involving matters which were precursors to a claim for diplomatic protection. The Commission might therefore wish to examine the issue of protective measures taken by a diplomatic or consular mission which might be precursors to a claim for protection. He also wondered whether the term "diplomatic protection" in article 4 of the Hague Convention did not cover a wider range of activities than the issue of "diplomatic protection" as it was currently understood, perhaps extending to the protection of human rights. The effective nationality criterion under that article also appeared to be applied with increasing frequency in determining the admissibility of a claim of diplomatic protection brought by a person with dual nationality. On the other hand, the traditional view, at least in certain common law countries, was that a State's right to exercise diplomatic protection was discretionary and that there was no individual right to such protection under domestic law. A different approach might consist of analysing the basis on which a national might claim a right to diplomatic protection. If such a right had become a human right, then it would accrue only to natural legal persons. It should also be borne in mind that it was States that determined the basis on which they attributed their nationality. In any case, an analysis of the views and practices of States was required before the rights of individuals to demand diplomatic protection could be recognized.

49. As to the protection claimed by international organizations in respect of their agents, it was based on the functional relationship between the organization and its agents. He had reservations about the extent to which the principles of diplomatic protection could be applied to the protection exercised by international organizations. The Commission might consider, at the preliminary stage, the relevance of privileges and immunities accorded to an international organization in the State in which the injury occurred, in particular, the availability of a remedy under the constituent instrument of the organization to which the respondent State was a party. Thus, a claim of diplomatic protection by a State would arise under general international law, whereas a claim by an international organization for injury to its agent might in certain circumstances arise under a treaty. It would also be useful for the Commission to specify the circumstances under which a State was deemed to have espoused a claim of diplomatic protection, since State practice indicated that States might take steps to protect or assist their nationals even when, strictly speaking, there was no entitlement to present an international claim. It would also be useful to examine the case of individual renunciations of offers of diplomatic protection or involuntary acquisition of the nationality of the State against which the claim was brought.

50. **Mr. Al-Baharna** (Bahrain), speaking on the topic of State responsibility, said that his country attached particular importance to the interrelationship between international crimes and delicts, countermeasures and the settlement of disputes, as well as to the identification of lacunae in the articles adopted on first reading, particularly in view of recent State practice. He supported the recommendations and procedural decisions adopted by the Commission, in particular its decision to appoint a Special Rapporteur. He shared the Commission's view that comments by Governments were particularly useful for the treatment of the topic and the preparation of the Commission's report. However, in view of the complexity of certain key issues, such as Part One, article 19 of the draft articles, and Part Two, article 47, the discussions on those issues, which he assumed to have been settled following the adoption of the aforementioned draft articles on first reading, should not be

reopened. He feared delays which would prevent the Commission from completing its work by the end of the quinquennium, as planned.

51. The legal consequences arising from an international crime were different from those arising from international delicts. Aggression, genocide and apartheid were all State crimes under article 19, even if they were perpetrated by State officials and not by the States themselves. State officials who had committed war crimes were individually liable to criminal prosecution. A State that was guilty of such crimes was liable to compensate the victims of such criminal acts. Article 47 on countermeasures by an injured State struck a balance between the interests of the injured State and the wrongdoing State, and set out the necessary criteria for limiting the scope of countermeasures that might be taken against the wrongdoing State.

52. He welcomed the fact that a Special Rapporteur had been appointed for the issue of prevention under the topic of international liability for injurious consequences arising out of acts not prohibited by international law, which had been the subject of many controversies, and had been on the Commission's programme of work for nearly 20 years; in his view, the issue of prevention should be considered separately. He therefore supported the Commission's recommendations and welcomed its decision to continue to retain the topic as one of the main items on its agenda, with a view to its progressive development and codification.

53. Turning to chapter VIII, on diplomatic protection, he once again welcomed the appointment of a Special Rapporteur on that topic. He agreed with the conclusions of the Working Group on that topic and urged States to make their views on it known. The study should be confined to the codification of secondary rules; it should therefore deal with the consequences of an internationally wrongful act which had caused an indirect injury to a State as a result of the direct injury suffered by its nationals, and owing to the limitations of the topic, should exclude primary rules. It should not include damages arising from an injury caused by a State to another State. Its scope should be limited to diplomatic protection in the sense of the espousal by a State of the claims of its nationals who suffered injury or were denied proper legal redress in another State; it should not cover the ordinary diplomatic and consular practices of States, which were already covered by the two Vienna Conventions of 1961 and 1963 on diplomatic relations and consular relations, respectively. In view of the *Reparation for injuries suffered in the service of the United Nations* case, the study should take into consideration the position of international organizations and their exercise of functional protection on behalf of their agents. The study could take the form of articles and commentaries which could be embodied in a convention or guidelines.

54. With regard to unilateral acts of States, he shared the Commission's view regarding the advisability and feasibility of a study on the definition of applicable legal rules, in the context of the codification and progressive development of international law. He agreed with the Working Group that State activities which did not carry legal consequences should be outside the scope of the study, as should internationally wrongful acts, which were covered under the topic of State responsibility. Also to be excluded were unilateral acts of States in the process of treaty formation, execution and termination, together with acceptance of the optional clause provided for in article 36, paragraph 2, of the Statute of the International Court of Justice, which were governed by the law of treaties. On the other hand, he did not exclude collective or joint acts by which States expressed the same willingness to produce effects without any need for the participation of other parties in the form of acceptance. Further, the reference, in the title of the topic, to States, implied that acts performed by international organizations were excluded, even though they were considered as subjects of international law.

55. He could not, however, support the view of the Working Group that internal acts that might have effects on the international plane, such as fixing the extent of the various kinds of maritime jurisdiction, should be included in the study, inasmuch as that sphere was already the subject of a well-defined legal regime based on the 1982 Convention on the Law of the Sea, which it would not be advisable to encroach upon. With respect to the proposal to change the title of the topic, his delegation thought it preferable to retain the current title, since it took up a term always used in textbooks, the word "legal" being understood. Moreover, the expression "unilateral legal acts of States" seemed to imply that there were two types of acts: legal and illegal. In addition, the term "legal" seemed to apply to the acts themselves, whereas it actually referred to their consequences, that being a further reason to retain the existing wording.

56. Lastly, he agreed with the programme of work set for the Commission, which proposed to complete its first reading of the text within the current quinquennium. As for the form which the study should take, he agreed that it should be determined on the basis of discussion and the preliminary conclusions of the Special Rapporteur.

57. **Mr. Borhan** (Egypt) welcomed the submission by the Commission of a set of articles on the nationality of natural persons in relation to the succession of States only four years

after inclusion of the topic in its agenda. That demonstrated its interest in topics of concern to the international community, which had recently witnessed a very notable increase in the numbers of successions of States and the problems relating to the nationality of natural and legal persons. His delegation was certain that the draft articles would help to guarantee the right of all individuals to a nationality, an object set forth in the Universal Declaration of Human Rights, as well as reduce cases of statelessness, as did the relevant convention.

58. His delegation welcomed the balance struck by the Commission between respect for the will of the individual regarding the choice of nationality where he fulfilled the requirements for different nationalities, and respect for the right of States to set conditions on the attribution of nationality, particularly where they did not allow dual nationality, with the general object of avoiding cases of statelessness. The Commission had recognized that nationality was primarily governed by national legislation, but that it was also a question of interest under international law.

59. The criterion of "appropriate connection" between the State and the persons concerned lacked objectivity and might well be interpreted differently depending on the State and thus result in new cases of statelessness. There was thus a need to establish precise criteria so as to avoid the arbitrary application of existing criteria, which would undermine the balance sought between the right of the State and the right of the individual. In general his delegation agreed with the use of the criterion of habitual residence for the attribution of nationality in connection with the succession of States, provided that habitual residence constituted an effective legal connection between the State and the person concerned. Further, while it was necessary to strike a balance between the right of the State to determine who its nationals were and the right of the persons concerned to acquire a nationality, the State was not obliged to attribute its nationality to those who did not show any desire to acquire that nationality or who could not explain why they had their habitual residence in another State. Moreover, his delegation was of the view that article 27 should be in part I of the draft articles, General provisions, and not in part II, on specific categories of succession of States.

60. With regard to chapter V of the report, the Vienna regime was the outcome of lengthy study by the International Law Commission in collaboration with the International Court of Justice, in particular its 1951 advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. The regime was a good compromise between complete freedom to formulate reservations, which might undermine the object of the treaty, and the prohibition of reservations, which might well dissuade some States from acceding. His delegation endorsed the view of Mr. Pellet that the formulation of reservations to a treaty was an established right and that the Vienna regime, through its flexibility, maintained both the integrity of the text of the treaty and the universality of participation in it. There was no justification for not applying the regime to normative treaties and to human rights treaties, since the Vienna Convention had been drafted to apply to all categories of treaties and most human rights treaties concluded since the Vienna Convention contained, with respect to reservations, specific provisions referring to that Convention and using the purpose and object of the treaty as criteria. The Vienna Convention allowed States to formulate reservations to the provisions of a treaty that were contrary to their national legislation, provided that such reservations were not incompatible with the fundamental purpose and object of the treaty. Consequently, his delegation supported the Commission's preliminary conclusions on reservations to multilateral treaties, in particular paragraphs 6 and 7 concerning monitoring bodies established under multilateral treaties.

61. With regard to chapter VI on State responsibility, General Assembly resolution 51/160 had encouraged Governments to submit their views on the draft articles adopted on first reading, and he trusted that the Commission would begin its second reading at its next session so as to be able to complete its work within the five-year time-frame established, since the question was of great importance, particularly for many multilateral treaties. Similarly, his delegation hoped that the question of international liability for injurious consequences arising out of acts not prohibited by international law would be given greater priority over the next five years, as it had been on the Commission's programme of work for almost 20 years, which made it one of the oldest pending items, along with State responsibility.

62. Lastly, he welcomed the inclusion in the Commission's programme of work of the topics of diplomatic protection and unilateral acts of States, but at the current preliminary stage the Commission must not rule out the possibility of formulating guidelines or recommendations.

63. **Mr. Smejkal** (Czech Republic) said that his delegation had noted with satisfaction that the International Law Commission had adopted its preliminary conclusions on reservations to normative multilateral treaties including human rights treaties, which were contained in paragraph 157 of the report (A/52/10). The conclusions clearly and unambiguously underscored the unity of the regime of reservations and the full applicability of the Vienna regime

to normative treaties, including human rights treaties, a position which his delegation deemed to be the only valid one. In the light of recent variant interpretations, the Commission reaffirmed that the consensus basis was the foundation underpinning a State's willingness to be bound by a treaty.

64. The Commission also rightly believed that the legal force of the findings made by bodies established to monitor human rights treaties could not exceed that resulting from the powers given to them for the performance of their general monitoring roles. Accordingly, in the absence of an express provision to the contrary, such bodies, with the notable exception of certain regional bodies with broader powers, generally could only formulate observations and recommendations concerning reservations by States, and it was for the reserving States to draw the appropriate conclusions. Reservations most commonly were construed as actual conditions under which a reserving State would consent to be bound by a treaty and therefore were inseparable from that consent. His delegation welcomed the Commission's entirely appropriate invitation to monitoring bodies established by human rights treaties to offer their comments if they wished to do so.

65. With regard to State responsibility, his delegation recalled that it had addressed the issue in some detail in the Committee the preceding year and that its statement had focused on topics which the Commission now identified as fundamental problems on which the views of Governments would be particularly useful, namely, the concept of international "crime", countermeasures and the settlement of disputes. His delegation's position remained unchanged and it would provide it to the Commission in writing, as the General Assembly had requested.

66. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation took note of the Commission's decision to consider the "prevention of transboundary harm" aspect of the topic first, while retaining the topic on its agenda as initially conceived and under the longer title pending receipt of additional comments from Governments on the "liability" aspect, which should help it reach a final decision on the matter. The Commission's confusion was understandable: the "liability" aspect definitely was a key component of the topic in question and was of considerable practical import as well. However, the topic, which was relatively poorly defined in judicial practice and doctrine, was controversial and invited conflicts which spring, *inter alia*, from differing interpretations of the matter under different systems of national law and entailed clashing theories with respect to risk, liability, abuse of rights and breaches of good-neighbourliness, to cite only a few; such clashes significantly clouded the question as to what regime was applicable at the international level. Even if the crux of the problem was defined in terms of primary rules, the fact remained that the meaning of "*sic utere tuo ...*" was very difficult to interpret in positive international law. Accordingly, his delegation believed that the Commission's decision to separate the two aspects of the topic, at least temporarily, was appropriate and would at least allow progress on the "prevention" aspect. With regard to prevention, his delegation noted that the subtitle referred to hazardous activities and that the preceding year it had suggested limiting the scope of the articles for both aspects of the topic to activities involving risk. The inclusion of activities not involving known risks obviously would be meaningless for an examination of prevention alone, but his delegation understood why the Commission appeared to limit the scope of prevention even further by using the term "hazardous activities" rather than activities "involving risk".

67. With regard to diplomatic protection, his delegation had noted with interest the report of the Working Group and the outline of the topic's content, with which it was in general agreement. At least at the current stage of the Commission's work on the topic, the functional protection extended by international organizations towards their agents should be considered along with diplomatic protection per se, since the initial results would supply the clarification needed for the subsequent adoption of a final decision on the inclusion of functional protection. In international jurisprudence, functional protection had been broadly based on the model of diplomatic protection, although certain specific elements had been naturally retained. Moreover, it would be useful to explore the connection between the two types of protection during the initial phase of consideration of the topic. In reply to another specific question posed by the Commission in paragraph 33 (a) (chap. III) of its report calling for the comments of Governments on chapter one of the proposed outline contained in paragraph 189 of the report, he said that his delegation was satisfied with the outline as currently drafted; in addition, it supposed that the effect of State succession on the exercise of diplomatic protection would be studied in the context of section A.1 of chapter one of the outline. It also believed that attention usefully could be paid in the context of the topic to the concept of the "law peculiar to" the State of which a private victim was a national, which formed the basis of diplomatic protection, by taking into account recent criticisms of the "law peculiar to" concept and the implications for different aspects of diplomatic protection, including the Calvo clause, the question of the consent of a private victim, including

"class action" cases, the extent of damage, the distribution of settlements, or the applicability of the transaction with respect to a private victim where the latter had not yet exhausted its direct legal remedies against the State concerned.

68. The topic of unilateral acts of States dealt with in chapter IX of the report generated some troubling questions. The Commission was turning its attention to the topic at a time when States were increasingly carrying out unilateral acts in the conduct of their international relations, to such an extent that unilateral acts had been considered, with slight exaggeration, to have at least partially supplanted treaty-based conduct in relations among States. The topic was at first glance so broad that it was essential to delimit its content and scope. In that connection, his delegation understood why the Commission suggested excluding certain acts, such as accession to, reservations to or denunciation of a treaty, which simply involved the formation, amendment or termination of treaty commitments and therefore were already adequately regulated by the law of treaties. His delegation also believed that all acts which were unilateral (meaning that they emanated from a single State) but did not by themselves have any effects, did not constitute true autonomous engagements. Those might, for example, include so-called "condition acts", which merely triggered the application of a legal regime defined independently of them. It also was necessary to exclude international juridical events, such as various notifications which did not entail an intention on the part of the author to become bound thereby, including fairly common situations in which internal juridical acts became, at the international level, simple juridical events.

69. Whatever the final scope of the topic turned out to be, his delegation would follow with particular interest the Commission's work on the regime of unilateral acts, particularly the question of their revocability. The binding character of a unilateral act and its autonomy as a source of law would appear to be singularly fragile, if not illusory, if it could be terminated at any time by a unilateral revocation, which the principle of the autonomy of will and the rule on the parallelism of forms seemed to suggest was the case. However, he wondered whether the concept of good faith alone was sufficient to limit unilateral revocability, and to what extent. And, ultimately, another question that arose was whether, it was not in fact necessary to view an engagement undertaken by virtue of a unilateral act as akin to treaty-based conduct, by presuming the tacit acceptance by the beneficiary of the right created (or the tacit acceptance by the debtor of the obligation where an author unilaterally renounced a right), or estoppel, which indirectly introduced an element of reciprocal obligations. With respect to the unilateral acts of international organizations, the title of the topic automatically eliminated them. His delegation endorsed that approach because it believed that such acts, or at least the great majority of them, which were carried out in exercise of an organization's normative or quasi-normative powers, related to an entirely separate topic which should be dealt with separately. Lastly, as to the final form which the outcome of the Commission's work on the topic should take, i.e., a doctrinal study followed by draft articles, general conclusions or guidelines, it was premature at the current stage to offer even tentative suggestions.

70. **Mr. Szénási** (Hungary), referring to chapter IV of the Commission's report (A/52/10), said that the Hungarian delegation wished to congratulate the Commission for having successfully completed, in a short period of time, the first reading of a draft preamble and 27 draft articles on the topic of nationality in relation to the succession of States. Mr. Mikulka, the Special Rapporteur, deserved a special tribute. In view of the turbulent changes of the past few years, the impact of State succession on the nationality of natural persons had been and continued to be a very sensitive political and legal problem, especially in Central and Eastern Europe. For that reason, his country attached particular importance to the topic and welcomed the results of the Commission's most recent session, which represented a major step forward in the endeavour to formulate a document aimed at preventing statelessness. Although his delegation planned to respond to the Commission's request to Governments for comments and observations, it wished to offer a few general comments.

71. His delegation fully supported the approach of the Commission which, although it took due account of the legitimate rights and interests of States and individuals, also safeguarded the human rights of the persons concerned on the basis of the argument contained in paragraph 7 of the commentary. That approach was evident not only in the preamble, but also in various provisions, for example, article 10, which attributed a role to the will of the individual; article 11, which protected the unity of the family; article 12, which recognized the rights of the child; article 13, which protected habitual residents from the negative consequences of State succession, in particular from the forced transfer of residents and ethnic cleansing; and, lastly, article 14, which forbade discrimination on any grounds, a provision aimed at protecting minorities. His delegation had noted with interest that in defining the link which must exist between the persons concerned and the State involved, the draft used different terminology in various articles. For example, article 10, which sought to prevent statelessness, used the term

"appropriate connection" and did not use the stricter criterion of "effective link". On the other hand, article 18, which dealt with the rights of other States not to give effect to the decision of a State concerned, used the concept of "effective link". At the same time, his delegation was convinced that, in order to avoid problems of interpretation, no effort should be spared to establish objective criteria which could be applied universally in the text. The Committee also should bear in mind the phrase "genuine and effective" nationality, a term first used by the International Court of Justice in the Nottebohm case, and which also was contained in subparagraph 2 (a) of article 18 of the European Convention on Nationality recently adopted within the framework of the Council of Europe.

72. Bearing in mind the profound changes which had occurred in recent years in the vicinity of his country, his delegation eagerly welcomed the equivalent paragraphs (b) of articles 22 and 24, applicable respectively to the dissolution of a State and to the separation of a part or parts of its territory. In the case of a pre-existing link, such as place of birth, the last habitual residence in the territory of the predecessor State or any other appropriate connection of a similar nature with the successor State, the paragraph provided that successor States would attribute their nationality to all persons concerned, as the expression was defined by article 2 (f), even if they had their habitual residence in the territory of another successor State or in a third State. By so doing, the draft addressed the difficult situation which arose when successor States did not wish to attribute their nationality to the persons concerned or when they established conditions for the acquisition of their nationality which could not be met.

73. With regard to the format which the results of the work on the topic would take, his delegation noted that the Commission had added a preamble and that article 2 indicated that the format had not yet been formalized; the Commission therefore could still move beyond a declaration of the General Assembly consisting of articles with commentaries.

74. With regard to chapter V of the report, on "Reservations to treaties", which was one of the most important items on the Commission's agenda, Mr. Pellet, the Special Rapporteur, deserved congratulations for having produced two excellent reports on the subject and a draft resolution which was the basis for the "preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties" adopted by the Commission. His delegation endorsed those conclusions. Indeed, it agreed with the Special Rapporteur and the Commission that the major rules of the "Vienna regime" on reservations established by the 1969 and 1986 Conventions remained applicable to multilateral treaties including normative treaties. It endorsed the cautious approach of the Commission in adopting "preliminary conclusions" instead of a resolution. That allowed for any flexibility that might be required. His delegation also agreed with the Commission that reservations should continue to be governed by articles 19 to 23 of the Vienna Convention of 1969, since they struck a balance between the objective of preserving the integrity of the text of the treaties and the universality of participation in those treaties. Nevertheless, it was convinced that important new developments had occurred in the field of treaty relations since the adoption of the Vienna Convention of 1969 on the Law of Treaties, in particular, in the field of human rights.

75. It was well known that the issue of the admissibility of reservations to human rights treaties had been the centre of attention during the Commission's deliberations. He commended the Commission for having found a reasonable compromise in paragraph 5 of its conclusions which acknowledged the powers of the monitoring bodies established by human rights treaties. To reach that compromise, the Commission had had to alter the original draft of the Special Rapporteur, according to which the monitoring bodies would have had competence to carry out a determination function with respect to the permissibility of reservations (A/CN.4/477/Add.1, para. 260). It should also be recalled that, as a corollary to that position, in paragraph 12 of its conclusions, the Commission emphasized that they "were without prejudice to the practices and rules developed by monitoring bodies within regional contexts". The consideration of the nature and legal effects of reservations to human rights treaties had been prompted by certain positions taken by monitoring bodies established by human rights treaties. In recent years, those bodies had started to assess the permissibility of reservations formulated by States to the instruments under which they had been established. There was no time to examine in depth the role and competence of monitoring bodies established by human rights treaties and he therefore could not explain his delegation's position on a number of important issues, such as general comment No. 24 adopted under article 40, paragraph 4, of the International Covenant on Civil and Political Rights by the Human Rights Committee in 1995, or the position concerning that general comment taken by several States and the Special Rapporteur himself. In that connection, he referred members to document A/50/40 (annexes V and VI), A/51/40 (annex VI) and to the second

report of the Special Rapporteur (A/CN.4/477/Add.1). Nevertheless, several points were worth emphasizing.

76. In recent years, Hungary had consistently supported the strict observance and full application of human rights treaties. It had become party to the Optional Protocol to the International Covenant on Civil and Political Rights in 1988 and to the Convention for the Protection of Human Rights and Fundamental Freedoms and the Additional Protocols thereto in 1992. It was doing its best to cooperate with other like-minded States within the framework of European regional organizations, especially the Council of Europe, to ensure strict compliance with treaty obligations undertaken by States in the field of human rights, including minority rights, and humanitarian law in general. Hungary also supported the Commission's programme of work in the field of reservations. It therefore looked forward to the two new reports to be submitted by the Special Rapporteur in 1998 on the definition of reservations and on the effects of reservations, acceptances and objections to reservations.

77. **Mr. Herasymenko** (Ukraine) said that his delegation duly appreciated the research undertaken by the Special Rapporteur on the topic of reservations to treaties and the conclusions which he had formulated. Several aspects of the problem had yet to be clarified, however, including the definition of the inadmissibility of reservations to treaties and the consequences of inadmissibility. It supported those members of the Commission who believed that the Vienna regime did not provide for a procedure for formulating reservations and objections thereto nor did it provide a method for defining the admissibility of reservations. The determination of the admissibility of a reservation was a prerogative of States and only States could define the consequences of the inadmissibility of reservations. Only if States failed to do so should the opinion and recommendations of the monitoring bodies come into play. The activities of monitoring bodies, however, should be strictly limited to the scope of their competence and no additional authority should be attributed to them except in accordance with treaty provisions.

78. With regard to reservations to bilateral treaties, it was difficult to agree with the logic of such reservations, since it was obvious that a reservation to a bilateral treaty amounted to a unilateral change in its text without the consent of the other party. His delegation supported the idea expressed by several members of the Commission that research should be carried out on interpretative statements, since that would help to draw a clear distinction between such statements and reservations.

79. His delegation welcomed the Commission's deliberations on the topics of unilateral acts of States and diplomatic protection. The first topic was of particular interest to Ukraine. The well-known solemn declaration by the Parliament of Ukraine on the non-nuclear status of that country was an excellent example of a unilateral act and its consequences for Ukraine and the entire world were significant. With regard to diplomatic protection, it might be expedient to study the principles of diplomatic protection of persons with dual citizenship.

80. Among the important issues considered by the Commission at its most recent session, the Ukrainian delegation attached particular importance to the topic of the nationality of natural persons in relation to the succession of States. In Ukraine's opinion, the text prepared by the Commission reflected more or less adequately the contemporary practice of States and constituted a solid basis for further discussions. Ukraine supported the basic approach underpinning the whole body of draft articles, which was an emphasis on human rights, including the right of every person to a nationality. It also endorsed the general presumption which was at the core of the draft articles, namely, the attribution of nationality primarily on the basis of the habitual residence of the persons concerned in the territory affected by succession, as well as the principle according to which the acquisition of nationality took effect on the date of succession. Ukraine had also adopted that approach in its legislation on succession and citizenship by attributing its nationality in the first instance to those persons who resided permanently in the territory of Ukraine either on the date of succession or on the date of the adoption of the respective legislation. Draft article 4 seemed to convey the same idea in more general terms.

81. Several of the provisions of the draft articles on nationality raised questions of a legal nature for the Ukrainian delegation and might produce problems if applied in practice. Firstly, the exact meaning of the principle of non-discrimination with respect to nationality remained very unclear in the text of article 14. As Ukraine understood it, the principle should be interpreted in that context as non-discrimination on the grounds of race, colour, political or religious convictions, sex, ethnic or social origin, language or property status. It might be useful to add such a clarification, which might influence the actual application of the principle.

82. The Ukrainian delegation was also concerned that some States might use the occurrence of succession to extend their jurisdiction into the territory of other States by attributing their citizenship to persons concerned residing in the territory of such other States. Regrettably, the draft

did not prevent such a possibility. For example, article 7, paragraph 2, which did not have a saving clause like the one found in paragraph 1 of the same article, if interpreted literally, required a successor State to attribute its nationality to persons concerned who had their habitual residence in another State against the will of such persons, if they would otherwise become stateless. In addition to being in contradiction to article 10, paragraph 2, such a stipulation was fraught with dangerous consequences for the sovereignty of the other States concerned and opened the door to abuse.

83. Like many other delegations, Ukraine held the view that the use of the term "appropriate connection" throughout the draft text, particularly in article 10, on the right of option, created undesirable connotations and variations of interpretation, which could not be justified. It was preferable to employ instead the well-established term "effective link", which was also found in article 18. Even while employing an unsuitable term, article 10, paragraph 2, still provided for reasonable restrictions on the rights of persons concerned to opt for a nationality. That position seemed tenable and acceptable inasmuch as it satisfied the main objectives pursued, namely, to reduce to the maximum possible extent the cases of statelessness as a result of State succession and to find a balance between the legitimate interests of successor States in regulating a broad range of issues connected with the attribution of their nationality and the right of natural persons to opt for the nationality of one of the successor States. At the same time, the principle set out in article 10, paragraph 2, which was supposed to have general application, was completely denied by article 23, paragraph 2, which concerned the right to opt for nationality in case of the dissolution of a State. In practical terms, that language provided for the right of all persons concerned, regardless of their actual status or the existence of effective links with a particular State, to opt for the nationality of that State. In that respect, article 23, paragraph 2, should be seriously reconsidered, if not completely eliminated.

84. His delegation also had serious reservations with respect to article 27. It was not completely clear why it was necessary to include in the draft, which had a direct reference to human rights and fundamental freedoms, a provision similar to those found in the two Vienna Conventions: the legitimate interests and rights of individuals to a nationality and unity of the family, for example, must be protected regardless of whether or not a succession of States had occurred in conformity with international law. Finally, with regard to the status of the instrument to be adopted as a result of the work on the topic, Ukraine believed that it would be preferable to give the draft articles the form of a binding international agreement, as had been the case with the two previous Conventions on succession of States. He wished to underline that his observations were of a preliminary nature and that Ukraine would submit its commentaries in writing, as the Commission had requested.

The meeting rose at 6.15 p.m.

United Nations A/C.6/52/SR.24

General Assembly
Fifty-second session

Official Records

Distr.: General
25 November 1997

Original: English

Sixth Committee

Summary record of the 24th meeting
Held at Headquarters, New York, on Friday, 7 November 1997, at 10 a.m.

Chairman: Mr. Tomka ..... (Slovakia)

Contents

Agenda item 147: Report of the International Law Commission on the work of its forty-ninth session (*continued*)

This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of publication* to the Chief of the Official Records Editing Section, room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

97-82631 (E)

The meeting was called to order at 10.10 a.m.

Agenda item 147: Report of the International Law Commission on the work of its forty-ninth session *(continued)* (A/52/10)

1. **Mr. Yamada** (Japan) said, with regard to State responsibility, that the International Law Commission had been right to give priority to the topic by deciding to complete the second reading of the draft articles by the end of the current quinquennium. The piecemeal presentation of draft articles to date had made it difficult for Governments to provide consistent comments, but, following the completion of a set of draft articles on first reading, his Government had formed a group 12 scholars of international law who would make recommendations.

2. Meanwhile, his Government was considering certain key issues. the first was the lack of requirement of damage, and the omission of fault and negligence in draft article 1. The second, was the inclusion of the concept of international crime in draft article 19: it should be determined whether the concept of State crime had been sufficiently established in international law and, if so, whether a separate regime from that of civil responsibility was called for. Thirdly, with regard to circumstances precluding wrongfuiness, the question was whether such circumstances, with the exception of countermeasures and self-defence, should preclude responsibility rather than wrongfulness; if not, there might be an inconsistency between draft articles 1 and 35. Fourthly, there was the question of limitation on countermeasures, in particular conditions relating to the resort to countermeasures against international crime. The last point was dispute settlement, including compulsory arbitration.

3. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation endorsed the Commission's decision to study first the prevention of transboundary damage from hazardous activities. Although some Governments viewed international liability as the core issue, the Commission had failed over the past 20 years to define the scope and content of the topic, so it would be better to start with what was possible and practicable. Within that framework, the Commission should confine its work to transboundary damage and to activities having a risk of causing harm. The broader issues of creeping pollution and global commons should be excluded, at least initially.

4. With regard to diplomatic protection and unilateral acts of States, Japan would do its best to provide relevant information, following the Commission's clarification of the scope and content of those topics.

5. With regard to the work programme of the Commission for the remainder of the quinquennium, his delegation hoped that the work would proceed as outlined. In 1998 the Commission was expected to select topics for its long-term programme of work. That placed an obligation on the General Assembly to provide topics for the commission for the following quinquennium. Much had been said of the need for close interaction between the Assembly and the Commission. The codification and progressive development of international law was a joint exercise, and his delegation hoped that the momentum generated during the current session would enhance the dialogue between the General Assembly, Governments and the Commission.

6. **Mr. Fozein** (Cameroon) said that the Commission's report showed that the topic of reservations to normative treaties, including reservations to human rights treaties, still aroused considerable controversy on both legal and political grounds. The main question at issue was the right of States to assess any treaty before they committed themselves to be bound by the Vienna Conventions. The Commission's Preliminary Conclusions seemed to be moving in the right direction: they did not cast doubt on the Vienna regime, which had done much to democratize international relations in a world in which the law of force seemed to be taking the place of the force of law. The flexibility and adaptability of the system of reservations contained in the Vienna Conventions of 1969, 1978 and 1986 had ensured its effectiveness, making it acceptable to its intended users.

7. It was claimed in some quarters that allowing States to make reservations to treaties led to the destabilization of the law, which could be a matter of particular concern where normative treaties were concerned. A legal regime should therefore be established, the argument ran, to deal specifically with treaties in order to guarantee their integrity.

8. His delegation believed that that argument was misguided because it ignored the fact that the essentially supplementary nature of the Vienna regime left a variety of interpretations open to States. Yet the practical consequences of flexibility must be viewed with caution. The great diversity of areas covered by codification agreements put normative treaties into a special category, so that any demand for special treatment where reservations were concerned might give rise to a rash of difficult legal regimes to accommodate the specificities of each area. That would weaken the law of reservations to treaties rather than strengthen it. Lastly, the argument took too little account of the decentralized nature of international society, which led

States to prefer a flexible regime to a straitjacket that deterred them from making any commitment at all.

9. A State's right to make reservations to a treaty under the Vienna Conventions was not, however, absolute; it could only make reservations that were not incompatible with the object and purpose of the treaty. That criterion seemed sufficient to safeguard the integrity of a treaty, given that it applied when reservations were prohibited or declared impermissible. Reservations relating to peremptory norms or rules of *jus cogens* were clearly prohibited. However, it was up to the parties to specify in the treaty the provisions to which reservations were impermissible. Both the integrity of the treaty and the universal participation of States could thus be preserved in all categories of treaty.

10. His delegation therefore endorsed the first three of the Commission's Preliminary Conclusions. All that was required was for the criterion of compatibility to be spelt out more precisely. The uniformity of the reservations regime would also benefit if the Commission clarified the law applicable to treaties when a reservation was accepted or objected to, or when an interpretative declaration was made by one of the parties.

11. The problem of permissibility was not, however, confined to the criterion of the compatibility of reservations with the object and purpose of a treaty; there remained the question of who was competent to determine permissibility. Cameroon agreed with the advisory opinion of the International Court of Justice on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, which stated that permissibility was for the States parties alone to determine. Some human rights treaty monitoring bodies tended to set themselves up in judgement over the permissibility of reservations by States, but legally they were on shaky ground. It was doubtful that the theory of implicit competence meant that competence could be transferred from Governments to international organizations or that it allowed such organizations, in the absence of a mandate to that effect, to judge the intentions of Governments. If, however, human rights treaty monitoring bodies were vested with powers to make binding decisions, as was the case with some regional bodies, the theory of implicit competence could be invoked.

12. In all other cases, though, it was not for monitoring bodies to assume powers greater than those conferred on them by States. The Commissions' fifth Preliminary Conclusion was therefore unacceptable, and it was in any case contradicted by the seventh, with which Cameroon was in full agreement. His delegation also supported the other Preliminary conclusions. It hoped, however, that the Commission would ultimately come up with a guide to practice on reservations to treaties, possibly in the form of a resolution.

13. With regard to State responsibility, his delegation had commended the Commission's work in 1996, but had also made some constructive comments on the concept of State crimes and delicts, countermeasures and the settlement of general disputes. He recalled his delegation's view that the recognition of international delicts ought to have been accompanied by legal consequences. The draft articles were silent on that point, and the Commission should spell out whether it considered that such offences had no international consequences or whether they were governed by the ordinary law of State responsibility. On the other hand, if a State that was victim of an international crime could claim restitution in kind, then depending on the economic stability and independence of the perpetrator State, the intended legal consequences might not achieve their aim. The objective of an international sanction should be reparation, not punishment; it should be a means of bringing the offending State into conformity with the rules of international law and making it repair the consequences of its actions, not of compromising its political independence or threatening its economic stability, still less of imposing suffering on its people. His delegation therefore reiterated its request for additional consideration, on second reading, of the legal consequences of the Commission's distinction between international crimes and international delicts.

14. With regard to countermeasures, his delegation, while welcoming the balanced approach adopted by the Commission, would prefer to see the scope of measures of constraint enlarged by deleting the words "economic" and "political" from the draft articles.

15. His delegation continued to believe that the procedure for the peaceful settlement of disputes outlined in the draft articles on that topic was complex and costly and should be reconsidered. At the very least, it should be left entirely to the parties to a dispute to choose the modalities of settlement they deemed most appropriate.

16. **Mr. Varšo** (Slovakia), speaking on the topic of nationality in relation to the succession of States, said that his delegation could accept the draft articles as they stood, since they corresponded to his country's thinking and practice. Slovakia's legislation on nationality, adopted in January 1993, was in line with recent practice in the international community. He wished only to stress certain general aspects of the topic, such as the relationship between international and national law. The codification and the progressive development of international law in the area of

nationality in relation to the succession of States required the harmonization and balancing of the interests of the principal actors: the international community, the State and the individual.

17. The interest of the international community was referred to in the first preambular paragraph of the draft articles, although the Commission's commentary simply referred to cases of succession of States and, in a footnote, to the resultant problem of statelessness. Further explanations of the international community's concern over those matters would have been useful.

18. The interest of States was dealt with indirectly in the second preambular paragraph, where it was stated that nationality was essentially governed by internal law, within the limits set by international law, thus implying the right of a successor State to legislate conditions for the acquisition of nationality. Since transfers of sovereignty, in themselves political rather than juridical, were conditioned by many factors, prudence should govern the approach of successor States in the granting of nationality, and in that they could be guided by the Commission's definition of nationality. Slovakia supported the principle of transmission of nationality as set out in the draft articles, the legal means that ought to be available to individuals seeking to acquire the nationality of a successor State and other relevant principles such as non-discrimination, the right to a nationality, the prevention of statelessness and respect for the will of persons concerned, all of which had been applied in recent cases of succession.

19. While an individual's right not to be rendered stateless and to opt for nationality at will had, of course, to be safeguarded, the concern of the individual in the matter had to be reconciled, as always, with the interests of the majority of the community and of the State. The third preambular paragraph struck a balance between those competing interests, as did the draft articles as a whole.

20. On the question of the relationship between the Commission and the Sixth Committee in the codification and progressive development of international law, which had been raised by the Chairman of the Commission in his introductory statement, he urged that all the parties concerned should assume responsibility for the current situation and endeavour to understand the underlying problems so as to adopt a sound strategy for the future. Member States always had the right to submit suggestions or proposals to the Commission. Thus in his delegation's view, the Commission should address, in order of priority, the topics of State responsibility, reservations to treaties, and diplomatic protection. The question of international liability for injurious consequences arising out of acts not prohibited by international law should be dealt with as an aspect of State responsibility, with an emphasis on prevention. Similarly, the Commission itself was free to submit regularly to Member States its analysis of different points of international law and to make pertinent suggestions. The topics chosen for the codification or development of international law should not be the result of random selection but should be identified on the basis of a careful study of all legal viewpoints.

21. **Mr. Gray** (Australia), referring to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, said that his delegation had prepared written responses on technical issues arising from the different types of risks covered and from the relationship between articles 4 and 6 of the draft articles on the topic, which were the foundation for the later, more detailed articles 9 to 19.

22. Article 4 as currently drafted was broader than its predecessor, article B. Under a rubric of prevention that went beyond prevention of risk it now encapsulated three obligations: risk prevention *ex ante*, risk minimization *ex ante* and harm minimization *ex post*, the last of which, being related to transboundary harm that had actually occurred, might in some circumstances amount to prevention. Article 4 distinguished the occurrence of harm, which must be significant, from its effects, which might be minor. Thus, if article 4 was taken in conjunction with article 1 (b), the draft articles would apply to activities that did not involve risk of significant transboundary harm but did in fact cause it. It would be useful to clarify whether the last part of article 4 intended to impose an obligation to remove harmful effects; as drafted, some choice on the part of States could be implied, especially in conjunction with article 3, on freedom of action. In addition, the broad concept of prevention under article 4 was not commensurate with that under articles 9 to 19, on prevention or minimization of risk, being more closely related to that under articles 20 to 22, on compensation.

23. It should be noted that article 6, like article 4, drew a distinction between harm and effects, but referred to effects in both affected States and the State of origin. Clarification was needed as to whether both types of effects were also covered by the obligations in article 4, or only effects in affected States.

24. Articles 9 and 11 were both concerned with the question of authorization and should be placed together. The emphasis in article 11 could be strengthened by introducing the concept of good faith. Also, the introduction of a

temporal element, requiring reasonably prompt action on the part of a State in directing those responsible for pre-existing activities to obtain authorization, would reinforce the need for due diligence.

25. Under article 10 (risk assessment), the questions of who should conduct the assessment, what it should contain and the form of authorization were left to the State of origin to decide; it was in fact appropriate to avoid being overly prescriptive.

26. Articles 13 to 18 had to be considered in the light of international regimes governing more specific areas of activity. The purpose of article 13 was to require notification and transmission of information. As currently drafted, it also required a response, but that requirement might be more appropriately placed under article 14 (exchange of information) or article 17 (consultations on preventive measures). If, on the other hand, article 13 was to involve the exchange of information and not simply transmission and notification, then articles 13 and 14 could be combined under the title "Notification and exchange of information".

27. As to the general issue of the prevention of transboundary damage from hazardous activities, some activities might become hazardous only in conjunction with other activities, a fact that might necessitate an expanded exchange of information, a more liberal consultation regime and a broader assessment of risk that encompassed both the environment of other States and activities in those States. Similarly, the effects of transboundary activities in two States might combine to be felt in a third State, thus creating more than one State of origin.

28. On the general issue of international liability, the Commission should elaborate on joint liability arising from joint activities, and on associated issues including indemnities, rights of action and of inspection, dispute settlement principles and bodies, access, investigation and clean-up.

29. **Mr. Tiwari** (India) said that his delegation endorsed the procedure decided on by the Commission for consideration of the topic of State responsibility, as set out in paragraph 161 of the Commission's report.

30. Turning to the topic of international liability for injurious consequences of acts not prohibited by international law, he noted that the Commission had decided to accord priority to prevention. While his delegation had no objection to that approach, it felt strongly that establishing liability for injurious consequences emanating from such acts was of the utmost importance. Remedial measures were necessary in the event of failure of preventive action. The Commission should take account of contemporary practice in the field, which placed more emphasis on providing incentives, including capacity-building, to promote the observance of rules of due diligence. Implementation of the due diligence obligation should be made directly proportional to the scientific, technical and economic capacities of States. Failure to meet that obligation should entail enforceable legal consequences not involving economic or other sanctions.

31. His delegation welcomed the organizational method adopted by the Commission in dealing with the topics of diplomatic protection and unilateral acts of States. He agreed that the main thrust of the study of diplomatic protection should be to deal with the claims brought by States on behalf of their nationals against another State, but should not involve direct claims between States themselves. That approach conformed to the doctrine of diplomatic protection as developed in State practice and customary international law. Similarly, diplomatic protection should not overlap with the traditional diplomatic and consular protection clearly governed by the Vienna Conventions of 1961 and 1963. International case law, such as the decisions of the Permanent Court of International Justice in the Mavrommatis Palestine Concessions case of 1928 and of the International Court of Justice in the Reparation case of 1949, could also be of considerable assistance in approaching the subject. There was no doubt that a number of complex legal issues arose, including the claims of dual nationals, the possibility of parallel protection of claims by nation States or international organizations and class claims involving lump sum settlements for groups of persons. His delegation was convinced of the importance of the topic and its suitability for codification and progressive development.

32. The topic of unilateral acts of States was of current relevance, in view of the unprecedented increase in interaction between States and the frequency of unilateral acts which impinged on the vital interests of other States. He agreed with the Commission that the focus of the study should be on unilateral acts of States that were intended to produce legal effects. He looked forward to the initial report on the topic in 1998 and to the completion of the first reading of draft articles within the current quinquennium.

33. **Mr. Al-baharna** (Bahrain), referring to other decisions and conclusions of the Commission, said that his delegation endorsed the approach the Commission had taken in planning a five-year work programme for each of the topics on its agenda. With regard to methods of work, his delegation appreciated the Commission's stated intention to avoid repetition and reopening of issues in its debates, and felt that such discipline should be enforced especially in the

Drafting Committee. It disagreed, however, that the officers for subsequent sessions should be agreed upon in advance, because those members of the Commission who were still present at the end of a session would be working intensively to complete the agenda and finalize the report, and a proper election could not be organized under such circumstances.

34. For reasons of continuity and practical convenience, Bahrain also did not favour holding a split session as proposed. Moreover, it thought that the duration of the Commission's sessions was a matter that should be reassessed each year in the light of the volume of work. On the other hand, his delegation welcomed the Commission's wish to cooperate broadly with other United Nations bodies and suggested that the Commission might begin by consulting with the human rights monitoring bodies in connection with the topic of reservations to treaties. Bahrain supported the criteria for choosing new topics for the long-term programme of work, including topics that reflected new developments in international law and pressing concerns of the international community as a whole.

35. Lastly, members should not fail to note the gratifying tribute paid to the Commission by a representative of the International Court of Justice, describing its texts as eminently authoritative sources.

36. **Mr. Baker** (Israel) observed, with regard to chapter IV of the report (nationality in relation to the succession of States), that Israel constituted one of the relatively recent examples of State succession with an effect on issues of nationality. The Special Rapporteur for the topic and the Commission had rightly stressed the need to avoid situations of statelessness and to solve human rights issues incidental to State succession.

37. In the interests of consistency, the Commission had opted to define the expression "succession of States" in terms of responsibility for the international relations of territory, using the same formulation as in the two Vienna Conventions on succession of States. However, the issues of nationality relevant to the draft articles involved, to a much greater extent than in those other conventions, the internal legal bond between a State and individuals in its territory, rather than the international relations of the State. It would therefore be more logical and appropriate to define succession of States as the replacement of one State by another in the responsibility for the administration of the territory and its population.

38. The central presumption of article 4, that nationality was acquired by persons "habitually resident" in the territory affected by the succession of States, might be made subject not only to the other provisions of the draft articles but also to specific arrangements emanating from agreements between the States concerned, which would of course reflect relevant circumstances.

39. Article 10, concerning respect for the will of persons concerned, was regarded as central by the Commission. However, paragraph 2 of that article raised the question whether the obligation to grant such persons a right to opt for the nationality of the State concerned was compatible with the somewhat broad discretion the State had to determine the nature of the connection between such persons and the State. His delegation would be inclined to join those members of the Commission who had expressed preference for the well-established notion of "genuine link" rather than the more subjective, vaguer term "appropriate connection".

40. He questioned the need for the inclusion in such a declaration of article 13 (Status of habitual residents), as it might raise questions incidental to succession that were not directly related to nationality or the specific nature of the link between the State and the person concerned. The practical consequences arising from a status of habitual residency following a succession could be analysed in greater detail.

41. With regard to article 14 (Non-discrimination), he agreed that a prohibition against discrimination in dealing with nationality should, as a peremptory norm of international law, have a place in the draft articles. He concurred with those who considered that the illustrative list of criteria (race, colour, national or ethnic origin and religion) set out in the European Convention on Nationality should be restored to the text; otherwise, the prohibition could be interpreted as applying to broader criteria.

42. Article 18 (Other States) should be clarified, as it raised questions concerning the extent of freedom given to other States to determine questions of nationality.

43. Turning to chapter V of the report, specifically, the Preliminary Conclusions of the Commission contained in paragraph 157, he reaffirmed the integrity of the existing system for reservations to treaties set out in the 1969 Vienna Convention. The flexibility and adaptability of that system had been achieved only after considerable debate aimed at ensuring the broadest possible participation in treaties, while enabling States to record what they considered to be a basic national position, without prejudicing the object and purpose of the treaty. The process of bringing a treaty to a government and a parliament for ratification and accession necessarily involved subjecting the treaty to extensive constitutional, legislative and jurisprudential scrutiny. In some cases it became clear that a reservation was necessary

in order to harmonize the treaty obligations with the constitutional and legal framework of the State.

44. Such a decision was not taken lightly; in arriving at it, the question of such a reservation's admissibility and its compatibility with the object and purpose of the treaty were of the utmost priority. Under normal circumstances, only the reserving State itself was in a position to interpret and explain the nature of its reservation, the reasoning behind it and its compatibility with the treaty. No special monitoring body or regime could fulfil that function in the same way.

45. His country's practice had illustrated that problem. Upon acceding to various human rights treaties, Israel's constitutional structure, which was based on civil and religious norms governed by individual religious law, had required the Israeli Government to enter reservations reflecting the applicability of such religious laws *vis-à-vis* some provisions of the treaties. While monitoring bodies had called for a review of those reservations, the Israeli Government was of the opinion that they were not incompatible with the treaties concerned. He therefore joined those members of the Commission who had qualms about the formulation in paragraph 5 of the Preliminary Conclusions regarding the competence of monitoring bodies to comment upon and express recommendations with regard to the admissibility of reservations by States.

46. Paragraph 10 should include a suggestion that a reserving State should provide pertinent explanations concerning the reservation to another State or body before being called upon to modify or withdraw the reservation or to forgo becoming a party to the treaty; it was still unclear whether that provision even belonged in the text.

47. As to paragraph 12, he shared the concern of other delegations that it should not be understood as authorizing States to adopt tailor-made regional interpretative practices and rules which might depart from universally accepted practice based on the Vienna Conventions.

48. With regard to chapter VIII of the report, he welcomed the work accomplished by the Commission on the topic as a useful beginning. It was clear that the topic dealt with secondary rules involving the consequences of injury to nationals in the international sphere. The issues identified by the Commission under the four main areas (para. 189) opened up a vast field of study which in some cases covered matters dealt with by the Commission in other fields (nationality, genuine link and so on). He looked forward to the preliminary report to be based on the outline presented.

49. With regard to chapter IX, he was concerned that the Commission was embarking on a task of daunting proportions. All unilateral acts by States in the international sphere had legal consequences in one way or another. Paragraph 198 indicated the wide scope of the topic; it was unclear how any particular unilateral act could be extracted from a general field of international law and dealt with in isolation. Rather than using the expression "unilateral legal acts of States", as proposed in paragraph 207 of the report, it might be more accurate to refer to unilateral acts of States having international legal effects.

50. On the subject of the Commission's statute and membership, he noted that the Chairman of the Commission had called on the Sixth Committee for help and support with regard to the way in which the Committee elected the members of the Commission, the Committee being the only body authorized to amend the statute. In that connection, he recalled that the membership of the Commission was not intended to be based on political representation but to reflect the principal legal systems of the world. Unfortunately, under the current electoral method, which was linked to the regional group system, as set out in amended article 9 of the statute, his country's candidates were unable to participate, since a candidate from a State not connected to a regional group was excluded from the electoral process. That was a situation which deserved to be examined and rectified by the Committee. It was regrettable that persons eminently qualified to contribute to the development of international law should be prevented from doing so.

51. **Ms. Escarameia** (Portugal), referring to chapter IV of the report, said that she supported the approach of giving priority to questions related to natural persons over those connected with moral persons. Respect for the will of the persons concerned and the free choice of nationality was of crucial importance. She therefore strongly supported maintenance of the right of option in cases of succession of States and believed that it should apply to the maximum extent possible. That right was a powerful instrument for avoiding grey areas of competing jurisdictions.

52. She welcomed the embodiment in the draft articles of the principles of non-retroactivity of legislation, family unity and non-discrimination; the prohibition of arbitrary decisions concerning nationality issues; and the obligation of States concerned to take all reasonable measures to prevent statelessness. The solutions contained in article 4 and article 7, paragraph 2, relating to the presumption of nationality and the presumption of consent, were suitable.

53. In order to avoid misunderstandings, however, she would be grateful if an additional effort could be made to clarify such concepts as "appropriate connection" and "reasonable time-limit for the exercise of rights". Greater

detail would reinforce the protection of the right to a nationality as a human right

54. She was also strongly in favour of including in Part II a section providing for situations of decolonization. At the very least, the Commission's understanding, as reflected in paragraph (3) of the commentary on draft article 19, that the regime applied, *mutatis mutandis*, to such situations should be mentioned in the draft.

55. Turning to chapter V of the report, she stressed the fundamental importance which she attached to work on the topic, which was long overdue. While she did not wish to see any alteration of the principles embodied in the Vienna Conventions of 1969, 1978 and 1986, she believed that a higher level of clarification in that field was urgently needed. Under the current regime, it was often unclear which reservations were acceptable and what effects objections had on reservations and treaties. Each State thus became the sole judge of the compatibility of reservations with the object and purpose of the treaty. The Vienna regime was therefore incomplete and should be supplemented by provisions clarifying the issues referred to. That was particularly important in the case of norms of *jus cogens*, since reservations conflicted not just with the treaty concerned, but with a higher-level, pre-existing norm which the treaty embodied.

56. It also seemed wrong to condone the practice employed by some States of knowingly making reservations which ran counter to the core provisions of the treaty so that they could claim to be parties to the treaty while actually using it for their own interests. A related problem was that of declarations, which were sometimes used as a smokescreen for actual reservations. In that connection, it would be useful if the Commission would analyse the differences between declarations and reservations.

57. The question of reservations assumed critical importance in the case of human rights treaties. Rather than tackling directly the core issue of which reservations conflicted with the object and purpose of a treaty, the Commission had chosen a procedural approach, namely, referring the matter to the human rights treaty monitoring bodies. Those bodies had, in fact, acted for several years as guardians of the treaties concerned; acknowledgement of their recommendatory powers and encouragement of the dialogue between them and reserving States (Preliminary Conclusions 5, 9 and 10) were of the utmost importance.

58. That approach was, however, a partial one at best. In fact, the problem of inadmissible reservations was present in any type of treaty, and was especially serious in those that dealt with regimes that must be applied concretely and universally, such as the United Nations Convention on the Law of the Sea. She therefore hoped that the conclusions reached by the Commission would not preclude future study of the question of which reservations were contrary to the object and purpose of a treaty. Furthermore, she strongly favoured the adoption by the Commission of the doctrine of permissibility.

59. With regard to chapter VI of the report, she was confident that, on second reading, the Commission would re-examine the most crucial and sensitive aspects of the draft articles on State responsibility, namely, the questions of State crimes and countermeasures.

60. She had no difficulties with the legal concept of State crimes as defined in draft article 19, paragraph 2; Portuguese legislation provided for the attribution of criminal responsibility to legal persons, including the State, and she saw merit in the future development of the concept of international criminal responsibility. Nevertheless, the draft articles made no mention of any specific consequences attaching to a crime, as opposed to a mere wrongful act. That situation should be remedied in the future.

61. As to countermeasures, she was in favour of a legal regime that would minimize differences in the ability of States to take or respond to them. In that connection, she attached importance to the Commission's role in the progressive development of international law, as referred to in Article 13, paragraph 1, of the Charter.

62. Turning to chapter VII of the report, she concurred with the Working Group's recommendation that the Commission should proceed speedily with the completion of the draft articles on "prevention". The study of prevention, however, was merely an introduction to the crux of the topic, namely, the consequences of the acts in question. While she welcomed legal solutions which required States to take preventive action to avoid harm, such as making environmental impact assessments, she deemed it essential to establish the duty to pay compensation if harm occurred. She therefore strongly supported draft article 4, which emphasized the importance of preventive action, draft article 1 (b), which dealt with activities that did not normally entail risk but that nonetheless caused harm, and draft article 5, concerning the duty to pay compensation when transboundary harm occurred, with the understanding that it applied to the environment. She also stressed the need to strengthen the dispute settlement mechanisms.

63. She believed that the topic should be dealt with as a unit, including, but not limited to, the question of prevention. As to how the topic was related to that of State responsibility, a clearer distinction should be made between

situations involving strict liability and those involving responsibility.

64. Concerning chapter VIII of the report, she concurred with the approach proposed, namely, that the topic should be limited to codification of secondary rules and should not address the consequences of direct injury caused by one State to another. She would be grateful, however, if the question of persons in a territory under the administration of a State could be addressed. In addition, she strongly believed that the topic should include the protection claimed by international organizations for the benefit of their agents, on the ground both of the precedents existing in international case-law and of the basic fairness of such protection.

65. As to chapter IX of the report, she concurred with the general approach, scope and content of the study proposed by the Working Group and its special interest in the question of recognition of States and of the status of territories, while believing that it was premature to decide on the final form that the study should take.

66. Lastly, with regard to chapter X, she expressed appreciation to the Commission for its concise and well-organized report. The inclusion of chapter III and of the Commission's programme of work for the remainder of the quinquennium was particularly welcome.

67. She strongly supported the convening of periodic open-ended informal meetings between members of the Commission and the Sixth Committee, particularly at the outset of the Commission's work on a topic. As to the low number of replies received to questionnaires, she believed that that was due to a number of factors, including short deadlines and a lack of experts, rather than to a lack of interest. The questionnaires could be made more user-friendly if they were broken down into several sub-topics with different deadlines assigned to each one.

68. **Mr. Win** (Myanmar) said that the Government of Myanmar was endeavouring to update and modernize the legal system that had been in force in that country since independence 50 years earlier, and to promote the rule of law, especially in those territories that had only recently achieved peace and stability following the cessation of armed insurgencies.

69. The main topics considered by the Commission were of great relevance in the light of contemporary international reality, in which new States were coming into being, divided States were being reunited and the globalization of trade and technology had brought the world's people into closer contact than ever before. For that reason, he welcomed the adoption of General Assembly resolution 51/160 and fully supported the work of the Commission.

70. **Mr. Kerma** (Algeria) noted that, at its forty-ninth session, the International Law Commission had focused primarily on the topic of the nationality of natural persons in relation to the succession of States, as recommended by the General Assembly. He commended the Working Group on the topic for having completed its consideration of the draft articles on first reading in a relatively short time, thanks largely to the efforts of the Special Rapporteur. Recent international developments had lent added importance to the highly sensitive question of nationality which, while a sovereign prerogative of States, also had direct implications for the international order and therefore called for some regulation.

71. A reading of some provision clearly showed the importance attached by the Commission to achieving a balance between the legitimate interests of individuals and the right of individual States to determine their own legislation on the granting of nationality. The Commission was to be commended for the importance attached to observance of the fundamental rights of individuals, as reflected in its efforts regarding prevention of statelessness. In that regard, article 1 was one of the most important in the draft because it emphasized the right of every individual to a nationality, including in the event of a succession of States.

72. In keeping with its pragmatic approach to the right to nationality, the Commission had applied objective criteria based on actual situations. However, those criteria might in some cases prove inadequate and give rise to problems. In view of the need for a precise definition of the link which must exist between the individual and the State of which he wished to be a national, as well as the parameters of the concept of habitual residence, the risk of conflict between the desire to preserve family ties and the right of each individual to choose his own nationality without constraint had not been given sufficient consideration. Care should therefore be taken to avoid any arbitrary or discriminatory measures.

73. Dual or multiple nationality, although not a universally accepted concept, was becoming an increasingly common phenomenon calling for a more pragmatic examination. It was a question which sometimes gave rise to highly complex disputes between States. In that regard, he disagreed with the approach adopted by the Commission in proposing ways of preventing disputes. In many cases, such disputes were dealt with under bilateral agreements between States. That concern had been raised by the Commission, in particular in the provisions on consultation and exchange of

information between States. His delegation had noted with appreciation the realistic approach adopted by the Commission in attempting to safeguard the legitimate interests of States, while at the same time affording protection to individuals who, in the event of disputes, were generally deprived of their rights.

74. His delegation would prefer the draft articles to be in the form of a declaration, but was prepared to join any consensus which might emerge from the debate in the Sixth Committee and comments submitted by States. The essential thing was to have a text which enjoyed the widest possible acceptance.

75. Reservations to treaties had become part and parcel of international legal practice and had to a large extent contributed to the wider acceptability of multilateral treaties. The question of reservations was, by definition, a complex one, involving not only technical considerations, but also political ones which immediately gave rise to legitimate concerns on the part of States. In that respect, his delegation shared the preliminary conclusion of the International Law Commission that the object of the treaty alone was the most important criterion in determining the legitimacy of reservations. Moreover, he saw no need for a distinction between human rights and other treaties.

76. The creation of monitoring mechanisms under human rights treaties raised numerous difficulties as to the method to be used in determining the legitimacy of reservations, as well as to the risk of coming into conflict with conventional monitoring procedures employed by the contracting parties to the treaties in question. Such monitoring bodies should be authorized to determine the permissibility of reservations only if such authority had been expressly conferred on them by the treaty in question.

77. The Commission continued to encounter many difficulties in considering the question of State responsibility, which was an indication of the topic's complexity. The draft articles on the topic employed a number of concepts, such as international crimes, the distinction between international crimes and international delicts, and the ranking of unlawful acts of States, on which there was as yet no consensus. The Commission's task was made arduous and complex by the many political implications and by the lack of international bodies able to qualify a State act as a crime.

78. The other major difficulty lay in the equally sensitive area of countermeasures. In his view, the aim should be to prevent the escalation of measures and countermeasures and, to regulate their use in an objective and restrictive manner.

79. Regarding injurious consequences arising out of acts not prohibited by international law, his delegation urged the Working Group on the topic to persevere in its efforts to overcome the conceptual and theoretical difficulties involved. One principle which did appear to enjoy consensus was that of the right of victims of transboundary damage to appropriate compensation. That question would continue to occupy the attention of the Commission, which would not adopt a final position until it had received the comments of States, as well as any information they deemed relevant.

80. He welcomed the Commission's efforts to improve the efficiency of its methods of work with a view to completing all the draft texts before it by the end of the quinquennium. It had already shown itself capable of completing some drafts efficiently and rapidly. His delegation also shared the view of the Chairman of the Commission regarding the need for closer cooperation between the Commission, other United Nations organs and other bodies concerned with the development of international law.

81. **Mr. Politi** (Italy) said that the Special Rapporteur's second report on reservations to treaties gave a comprehensive outline of the subject. The International Law Commission considered that the 1969 Vienna Convention on the Law of Treaties was flexible enough to suit the requirements of all treaties, including human rights treaties, and that it struck a satisfactory balance between preserving the integrity of the treaty and assuring universal participation.

82. He agreed that the criterion of the object and purpose of the treaty was essential for determining the permissibility of reservations, but the solutions provided by the Convention with regard to the effects of impermissible reservations were far less convincing in the case of human rights treaties. Practice had shown that the inter-State system was inadequate for instruments characterized by the indivisible nature of the obligations they enshrined, and could even therefore enable States to become parties to human rights treaties without really committing themselves. On the other hand, the Vienna regime was so general as not to exclude the establishment of special regimes to fill any gaps. In his view, human rights treaties were by their very nature a special category that merited further in-depth study by the Commission.

83. He agreed with the Commission's conclusions on, and the Special Rapporteur's analysis of, the role of human rights treaty monitoring bodies. While their tendency to determine the permissibility of reservations could be justified on political grounds, from the legal point of view it clearly exceeded their competence unless such power was

conferred by the constituent instrument of the regime in question. He saw no contradiction between paragraphs 5 and 7 of the Commission's Preliminary Conclusions. Recognizing the competence of monitoring bodies to comment and make recommendations on the permissibility of reservations need not prevent States parties from extending the monitoring bodies' competence to determine permissibility in the future.

84. He agreed with the work plan devised by the Commission for the topic of State responsibility pending submission of comments by States. There was a sound legal basis for the distinction between international crimes and other internationally wrongful acts, and it was regrettable that reservations continued to be expressed on the very concept of international crime. Furthermore, that distinction meant that specific legal consequences applied to the relationship between a wrongdoing State and an injured State in the context of international crimes. On the basis of those premises, it was not for a single State to determine that an international crime had been committed, but for organs representing the international community, or international judicial bodies.

85. Efforts to clarify the rules of international law in the field of international liability for injurious consequences arising out of acts not prohibited by international law should be pursued with renewed determination, particularly in the light of the persistent uncertainty surrounding so-called ultra-hazardous activities and the prevention and consequences of transboundary environmental damage. While he agreed with the Commission's decision to deal with the question of prevention of transboundary damage before finalizing its views on international liability, international liability remained the core issue of the topic and needed to be adequately addressed by the Commission.

86. He commended the efforts of the Working Group on diplomatic protection to clarify the scope of the topic. He agreed that the topic was primarily concerned with the basis, conditions, modalities and consequences of diplomatic protection, particularly claims brought by States on behalf of their nationals against another State. He also believed that recourse to the criterion of effective nationality was crucial for resolving the issues arising from special cases, such as cases of double nationality. Even when an individual declined diplomatic protection from his or her state of nationality, that State could nevertheless exercise diplomatic protection, as such protection was a right of the State. The issue of function protection was closely linked to that of diplomatic protection. However, the protection claimed by international organizations for their agents should not be included in the topic to be addressed by the International Law Commission, but should be dealt with in a separate study.

87. He was satisfied with the general approach to the subject of unilateral acts of States proposed by the Working Group. The work should be initially focused on unilateral acts of States that were intended to produce legal effects. He wondered whether it might not be advisable to include an analysis of the various issues related to acquiescence; increasingly, States were not explicitly expressing their positions on specific events with legal consequences. Identifying the characteristics of acquiescence and the legal effects deriving therefrom could be of significant help in systematizing one of the most complex aspects of unilateral acts. However any decision with regard to the final form of the study on the topic, would be premature.

88. **Mr. Mikulka** (Special Rapporteur on nationality in relation to the succession of States) said that although the preliminary nature of the comments made by delegations meant that no final conclusions could as yet be drawn, there nevertheless appeared to be a consensus on a number of issues. He had been particularly encouraged by the support expressed for the Commission's efforts to define a right to nationality in the context of the succession of States, particularly as expressed in article 1. There had also been a very positive reaction to the provisions on the prevention of statelessness. The Commission's proposal regarding the obligation to take measures appeared to be line with the expectations of States and to provide a realistic framework for the draft articles.

89. Many delegations had emphasized the need to maintain the balance between the interests of States and those of individuals. That had been a constant concern of the Commission. As at the fifty-first session, delegations also appeared to see merit in the Commission's approach which sought to combine the traditional issues relating to the right to nationality with considerations related to the protection of human rights. There appeared to be wide support for presenting the draft articles in the form of a declaration, although some delegations, while not objecting to a declaration by the General Assembly, wished work to continue with a view to the adoption of a binding instrument.

90. While the reaction to the Commission's work on the question of nationality had been generally positive, some interesting criticisms had been made on various aspects of the draft articles. Those criticisms would be taken into account, and he was confident that the Commission would give very careful consideration to the aspects in question. There appeared to be a difference of views among States themselves on some substantive questions, such as the role

to be given to the criterion of habitual residence in drafting rules on the granting of nationality. While there appeared to be majority support for the approach proposed by the Commission, some delegations had drawn attention to the disadvantages of the general application of that criterion. Some delegations also appeared to have difficulty with the provisions on the right of option as drafted by the Commission, and questions had been asked about the usefulness of including certain draft articles.

91. Some doubts expressed by delegations might be attributed to an interpretation of the draft articles which differed from that of the Commission and could therefore be quickly dispelled by a more detailed explanation on the part of the Commission. Others might call for more detailed analysis and a review of the draft articles in question.

92. It would be premature at the current stage to say whether or how the draft articles should be revised on second reading. The discussion in the Sixth Committee was only one of the channels of communication between the Commission and States. States could also submit their comments in writing, in accordance with the procedure proposed in paragraph 43 of the Commission's report (A/52/10). He expressed the hope that the Commission would have all the necessary information to enable it to proceed with the second reading of the draft articles at its fifty-first session.

93. In conclusion, he thanked all those Governments who had responded to the Secretary-General's invitation to submit information regarding their national legislation, the decisions of national courts and diplomatic and official correspondence to facilitate the task of the Commission and invited all other Governments to do so as soon as possible.

94. **Mr. Pellet** (Chairman of the International Law Commission), speaking in his capacity as Special Rapporteur on reservations to treaties, said his hopes of stimulating a true debate on the issue of reservations to treaties had not been entirely disappointed. The large number of speakers on the topic showed that it had been well chosen and therefore that the International Law Commission's methods of selecting topics were not as terrible as they were sometimes made out to be. Delegations generally seemed to endorse the approach he had suggested and to agree that the Vienna regime should be the starting point and basis for future work on the issue. The majority of delegations were in favour of preserving the unity of the regime, which would apply to all categories of treaties, including human rights treaties. The view had been expressed that, since the Vienna rules were deliberately optional in nature, it would be useful to make exceptions for certain treaties, which would of course be quite compatible with the Vienna regime. He therefore proposed to prepare some model clauses which would apply not only to the area of human rights but also to other areas such as disarmament and environmental protection.

95. He was particularly gratified to note that the great majority of speakers were in favour of drafting a guide to practice. The preference of some delegations for a binding instrument seemed to him to offer more disadvantages than advantages.

96. He had been struck by the careful reasoning used by delegations to justify their approval of or objections to particular paragraphs of the Commission's Preliminary Conclusions. Those comments would be invaluable when the Commission took the matter up again after receiving comments from human rights bodies and other treaty-monitoring bodies. In that connection, he welcomed the Sixth Committee's readiness to consult with other bodies with an interest in the codification and progressive development of international law, and saw no problem in consulting with other monitoring bodies, as had been suggested by several delegations.

97. He regretted that some speakers had opposed the idea that the Preliminary Conclusions might take the form of a resolution of the Committee. A resolution would be nothing more and nothing less than an expression of the collective view, and might actually be as useful as, for example, the general comments of the Human Rights Committee. Nor could he see any legal obstacles to such an initiative. Perhaps those delegations that considered the Preliminary Conclusions to be premature had misunderstood the Commission's reasons for adopting them; they were intended not as a draft for the future guide to practice, but merely to focus the Committee's attention on the particular problems raised by reservations to normative treaties and, in particular, human rights treaties. It might appear more logical to address those problems at the end of the exercise, but the debate on reservations was already well advanced in the human rights bodies, and if the International Law Commission and the Sixth Committee, as organs of general international law, wished to have an input in that debate, they needed to make their voice heard, even in the form of preliminary comments that could be reviewed later. Moreover, if the International Law Commission did not wish to retreat into an ivory tower, but to consult effectively with both States and treaty-monitoring bodies, the consultations could not be deferred until a late stage of the Commission's work on reservations to treaties without delaying the completion of that work.

98. In general, delegations appeared to find the Commission's Preliminary Conclusions sufficiently well

balanced, although some had supported the position of certain human rights bodies which considered that a State which was the author of an impermissible reservation was bound by all the provisions of a treaty, a view that was not accepted by the International Law Commission as a whole. However, many more States had expressed their commitment to consensual principles. Some States had gone so far as to challenge the right of the human rights treaty monitoring bodies to take a position on the permissibility of reservations to treaties. In his opinion, that was rather an extreme view, and he was gratified to know that only a tiny minority of States appeared to share it.

99. He had taken note of the major concerns of delegations with regard to reservations to treaties, namely: the difference between reservations and interpretative statements; the precise definition of the fundamental idea of the object and purpose of treaties; the disadvantages of having no objective mechanism to determine the lawfulness or otherwise of reservations, an issue on which he had no preconceptions; and the effects of impermissible reservations and the effects of objections to reservations. He would address those issues in his next report.

The meeting rose at 1 p.m.

United Nations A/C.6/52/SR.25

General Assembly
Fifty-second session

Official Records

Distr.: General
1 December 1997
English
Original: French

Sixth Committee

Summary record of the 25th meeting
Held at Headquarters, New York, on Friday, 7 November 1997, at 3 p.m.

Chairman: Mr. Tomka ..... (Slovakia)

Contents

Agenda item 147: Report of the International Law Commission on the work of its forty-ninth session (*continued*)

This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of publication* to the Chief of the Official Records Editing Section, room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

97-82649 (E)

The meeting was called to order at 3.10 p.m.

Agenda item 147: Report of the International Law Commission on the work of its forty-ninth session (*continued*) (A/52/10)

1. **Mr. Da Fontoura** (Brazil) said that the "preliminary conclusions" on reservations to normative multilateral treaties, presented by the International Law Commission in paragraph 157 of its report (A/52/10), tackled two essentially interrelated problems: the problem of the unity or diversity of the juridical regime for reservations (conclusions 1 to 3) and the problem of the monitoring bodies established by human rights conventions (conclusions 4 to 12).

2. With respect to the first problem, his delegation agreed with the Commission that the Vienna regime was flexible enough to apply to all multilateral treaties. There was therefore no need at present to establish a regime specific to some normative treaties, including human rights treaties, even if there were lacunae and ambiguities in the Vienna regime. That flexibility was based essentially on the prohibition on the formulation of a reservation incompatible with the object and purpose of the treaty, even though, paradoxically, the provisions containing that prohibition were the ones most often mentioned as the cause of controversies over the admissibility of reservations. However, the virtues of the prohibition far exceeded its disadvantages.

3. The second problem, the role and the capacity of the monitoring bodies established by human rights treaties, also gave rise to lively debate, in which there seemed to be two conflicting positions. The traditional prudent approach of avoiding conferring any additional competence on the treaty bodies was manifested in the practice of States. The parties to human rights treaties tended to be very conservative in their reactions to reservations formulated by other States. The other position was to favour a rapid evolution of international law and international institutions in that area.

4. The members of the existing monitoring bodies were not representatives of Governments but experts acting in their personal capacity. That was part of the reason why the deliberations of such bodies were guided by criteria which were considerably more ambitious than the ones used by States. In any case, the bodies had a consultative function, and the determination of the permissibility of reservations was a prerogative of States. The monitoring bodies could express an opinion on the permissibility of a reservation but they could not declare it null and void or draw the consequences of their determination.

5. Turning to chapter VIII of the report, entitled "Diplomatic protection", he said that his delegation welcomed the Commission's decision to include the topic in its agenda and endorsed its solution to the question of the definition of the scope of the topic. It was important to limit it to secondary rules of international law in order not to waste too much time on less important questions, such as the specific content of the international legal obligation which had been violated.

6. The nature and definition of diplomatic protection was the most difficult aspect to be tackled by the Commission. According to the traditional doctrine, diplomatic protection could be exercised only under certain conditions connected with (a) the nationality of the claimant, (b) the exhaustion of local remedies, and (c) the previous conduct of the claimant (the "clean hands" rule). The Commission would have to study that point very carefully, for it required further clarification, as well as the functional protection applicable to agents of international organizations.

7. As to the outline of the content of the topic of diplomatic protection, item A4 would have to be supplemented by a detailed study of the denial of justice and its relationship to the exhaustion of local remedies.

8. One of the most interesting aspects of the unilateral acts of States, which was the subject of chapter IX of the report, an aspect much disputed in the doctrine, was the question of the inclusion or exclusion of such acts from the list of sources of international law. Article 38 of the Statute of the International Court of Justice and many contemporary authors made no mention of unilateral acts, since they were not norms but merely juridical acts. Other authors considered that they were only instruments of execution, which did not create general rules. But that was not always the case. Internal acts could produce international effects, such as the determination of the extent of maritime jurisdiction (territorial sea, ports regime, access by other Powers to the national waters of a State). It seemed difficult to deny the status of source of international law to such unilateral acts. The Commission should devote some time to consideration of that question.

9. Chapter IV of the outline proposed by the Commission contained the most important issues of all. It addressed the action of States and was concerned mainly with questions related to the practice of States, whereas the three preceding chapters were more doctrinal in nature. Whatever the final form of the results of the Commission's work, it was to be hoped that the end product would be more than just a doctrinal report. States would probably be more interested in item (b) on effects, item (d) on conditions of validity, and

item (e) on consequences of the invalidity of an international legal act. With regard to the effects, the views of the Commission on the "creation of rights for other States" and "situations of opposability and non-opposability" were of special interest to his delegation. As for the conditions of validity, the list of elements proposed by the Committee in its outline was sufficient. His delegation stressed the importance of a detailed analysis of the topic of the lawfulness of unilateral acts under international law. With regard to the scope of the subject, it welcomed the Commission's decision to exclude from the purview of its study unilateral acts committed by other subjects of international law, in particular by international organizations. That topic deserved individual treatment and should be the subject of future work.

10. Turning to chapter IV of the report, on nationality in relation to the succession of States, he noted with satisfaction that the Commission had kept constantly in mind the protection and promotion of human rights in its work on the draft articles under consideration, which it analysed in detail.

11. The preamble and the operative part were well-balanced and well-structured. The division of the draft articles into two parts, one containing general provisions and the other dealing with their application to specific types of succession, was a wise solution. Indeed, articles 20 to 26 were an indispensable complement to the provisions of part I, and their application without any qualification would be highly problematic.

12. Article 1 stated the principle on which the other provisions were based. The right to a nationality had already been established, not only in the Universal Declaration of Human Rights but also in the conventions on nationality and statelessness. Article 3, which stated the obligation of States involved in a succession to take all necessary measures in order to prevent statelessness, provided an adequate complement to article 1.

13. The Commission had been wise to include in article 4 a provision on the presumption of nationality. Indeed, recent cases of temporary statelessness due to the time-lag between the date of the succession of States and the adoption of legislation or the conclusion of a treaty between States had caused serious difficulties for the individuals concerned. Articles 7, 8 and 9 dealt with essentially practical problems. Even if at first sight they seemed dispensable, by including them the Commission had wished to signal clearly that certain State prerogatives remained valid for States involved in a succession.

14. His delegation welcomed the adoption of draft article 13, which provided that the status of persons concerned as habitual residents should not be affected by the succession of States as such and provided for the right of persons who, because of events connected with the succession of States, had been forced to leave their habitual residence, to return thereto.

15. Turning to chapter VI, on the topic of State responsibility, he recalled that, the previous year, his delegation had drawn attention to the important decision taken by the Commission to base its work on the premise that every internationally wrongful act by a State entailed the responsibility of that State. It had then gone on to say what constituted an internationally wrongful act, under what conditions such act should be attributed to a State, which circumstances precluded wrongfulness, and the legal consequences of a wrongful act. With regard to the Commission's future work, the Brazilian delegation welcomed the adoption by the Commission of its plan of work for the quinquennium. It was important, however, to accelerate the process of deliberations so that the second reading of the draft articles could be completed by the end of the mandate of the current members of the Commission.

16. During the forty-ninth session, the Working Group of the Commission on international liability for injurious consequences arising out of acts not prohibited by international law (chapter VII) agreed that international liability would be the core issue of the topic. His delegation fully supported that decision. On the Working Group's recommendation, the Commission had decided to undertake first prevention under the subtitle "Prevention of transboundary damage from hazardous activities". While it did not oppose that decision, his delegation believed that the Commission should also have as a priority a thorough consideration of the questions of liability and reparations, and especially the problem of compensation.

17. On the occasion of the commemoration of the fiftieth anniversary of the Commission, Brazil wished to reiterate its support for the Commission's work. In cooperation with the Secretariat, it would organize in 1998 the fourteenth Gilberto Amado Memorial Lecture, dedicated to the memory of the Brazilian jurist and former member of the Commission. The Brazilian Government, through the Fundaçcão Alexandre de Gusmão, had also decided to publish all previous Gilberto Amado Memorial Lectures.

18. **Mr. Sergiwa** (Libyan Arab Jamahiriya) said that he wished to comment on chapters V and IX of the report under consideration (A/52/10). With regard to chapter V, on the topic of Reservations to treaties, his delegation was of the

view that the achievements codified by the regime of the Vienna Conventions should be preserved, since they established a satisfactory balance between conflicting schools: on the one hand, they expanded the scope of multilateral treaties by permitting as broad as possible a participation while at the same time allowing States to make reservations to some of their provisions; on the other hand, they preserved the spirit of the treaties by prohibiting the formulation of reservations that were incompatible with their object and purpose.

19. Libya agreed with "Preliminary Conclusions" 1, 2 and 3 presented in paragraph 157, which reaffirmed the flexibility and adaptability of reservations. The Vienna regime applied to all normative multilateral treaties, including human rights treaties. It must be borne in mind that reservations were a sovereign right of States, which expressed in that way their opposition to certain provisions that were incompatible with their internal law or with their interests, without, however, impairing the very core of the treaty in question. For their part, it was not the role of monitoring bodies to determine the admissibility of reservations. That was a decision for the States concerned to make. Their functions should be limited to monitoring the implementation of treaty provisions and to making recommendations.

20. The Commission would consider the topic of Unilateral acts of States at its next session. Libya welcomed that decision, since the topic was a very important one and one that was well suited to codification and progressive development. Certain States adopted internal laws which had extraterritorial effects, imposing restrictions and economic sanctions on other States, in violation of the sovereign rights of such States, and hindering the efforts of the international community to achieve peace, security and development. In view of the proliferation of such unilateral acts of States, the Libyan delegation hoped that the Working Group's efforts would be fruitful and that it would succeed in establishing the legal foundations for addressing the economic impact of such unilateral acts.

21. **Mr. Morshed** (Bangladesh) said that he wished to state his Government's views on chapters IV, V, VII and IX of the report of the International Law Commission on the work of its forty-ninth session (A/52/10).

22. With regard to chapter IV, on the topic of Nationality of natural persons in relation to the succession of States, the draft articles adopted on first reading seemed to provide a viable structure for the development and codification of that difficult topic. However, with regard to the categories of succession of States, the parties concerned were likely to consider the question of succession and determine the category of succession in very different terms and with very different juridical consequences. His delegation therefore wondered whether it was desirable to mention the different categories of succession of States in Part II, since the situation being dealt with must be determined before the articles presented in Part I could come into play.

23. On the other hand, it was a source of satisfaction to note that the draft articles gave considerable weight to individual choice in the determination of nationality. That role could be expanded to prevent cases of statelessness, which must remain one of the principal concerns in cases of succession of States. Since, on the subject of nationality in relation to the succession of States, there were major differences between national systems on the one hand and international law on the other, it would be preferable for the topic to be the subject of a convention rather than a declaration, so that States would accept not only each of its provisions, but also the overall conception of the topic.

24. Turning to chapter V, on the topic of Reservations to treaties, his delegation was not in a position to subscribe to all the "Preliminary Conclusions" of the Commission (paragraph 157). It agreed with other delegations which had spoken previously that it was necessary to preserve the integrity and unity of the Vienna regime and that that regime should apply to all treaties, including normative multilateral treaties, and especially human rights treaties. But, on the subject of the role and possible competence of treaty monitoring bodies, it shared the view of those who believed that the Commissions's Conclusions were premature and unjustified. Reservations to human rights instruments were deeply rooted in differing conceptions of the role of such instruments. Notions, such as "normative treaty" and in particular "object and purpose of the treaty" were much more effective references to determine the admissibility of a reservation. That task should be entrusted to duly constituted institutions which had explicit mandates.

25. Turning to chapter VII, on the topic of International liability for injurious consequences arising out of acts not prohibited by international law, he hoped that the Commission would be inspired by the positive spirit which had enabled it to complete the draft articles on non-navigational uses of international watercourses. It might not necessarily be a bad idea to take up the topic of prevention, provided that it did not limit the scope of the work and that the Commission did not lose sight of the subject of the study.

26. The outlines of the topics on diplomatic protection (chapter VIII) and unilateral acts of States (chapter IX)

established by the Commission were useful points of departure.

27. In conclusion, his delegation wished to refer once again to the questionnaires prepared by the Commission, noting that they did not necessarily encourage dialogue. Governments were rightly hesitant to express positions which might be opposable to them, particularly in the formative stages of work on a particular topic. Less formal exchanges of views would be preferable and would certainly accelerate the responses of Governments. The Commission should explore ways and means of making the dialogue more fruitful.

28. **Mr. Holmes** (Canada) pointed out that State responsibility was an extremely important topic, which was interlinked with certain key elements of international law. Canada took note of the Commission's intention to accord it the necessary priority in order to complete the second reading by the end of the quinquennium. While adherence to time-frames was important, it must be borne in mind that codification in that area required careful attention. Sharing the concerns expressed by some delegations, his delegation questionned the congruity of article 19 with customary international law regarding the concept of "State crime", and the system of countermeasures, arbitration and conciliation and its potential effect on existing treaties. As difficult as the area was, his delegation was confident that the new Special Rapporteur, Mr. James Crawford, would handle it with his customary skill.

29. His delegation welcomed the Commission's work on the issue of international liability for injurious consequences arising out of acts not prohibited by international law (chap. VII, paras. 162 to 168). It was a complex subject linked to that of State responsibility. His delegation supported the Commission's approach in treating the prevention of transboundary damage from hazardous activities, as a separate issue, which would greatly facilitate the conduct of its work.

30. The proposed draft articles were based on the principle of customary international law which established the obligation to prevent or mitigate transboundary damage arising out of activities that were under the control of a State. His delegation accepted the principle, as established in the *Trail Smelter* case and welcomed its codification by the Commission.

31. The existence of harm was a prerequisite for the establishment of liability. However, the question of whether liability should flow from the mere existence of harm or from conduct reflecting a lack of diligence might be better determined by the nature of the activity and the risk it posed. With regard to reparation, his delegation agreed with the Commission that reparation was preferable to compensation in the case of environmental damage.

32. The remaining draft articles were consistent with what national and international environmental assessment should be. Regarding the future development of the draft articles, it would be desirable to permit States to override them where they dealt with specific issues of liability with respect to which a treaty was being negotiated. The general issue of relationship with existing treaty law in the field of international liability must also be addressed.

33. His delegation supported the Commission's decision to pursue its work on diplomatic protection, which was dealt with in chapter VIII of its report. It would be useful to have guidance on it, particularly with regard to dual or multi-nationality. The study should be confined to the codification of secondary rules, but the Commission could also consider the protection claimed by international organizations for the benefit of their agents. It should be made clear in the reports on that question, however, that "functional" protection was distinct from the protection claimed by States and flowed from a different basis.

34. His delegation was in favour of the study on the topic of unilateral acts of States (chap. IX). In view of the current state of customary international law, it would be helpful to clarify the rules governing the creation of rights and obligations by unilateral acts of States intended to produce legal effects.

35. Even though the need to hold a split session in 1998 had been dictated by extraneous circumstances, his delegation was nonetheless convinced that it would be fruitful. Convening one of the split sessions in New York in 1998 would help to offset some of the costs and would establish closer linkages between the work of the Commission and that of the Sixth Committee. It would be useful, for example, to hold informal briefings and meetings during that segment; that would also strengthen the dialogue between the Sixth Committee and the International Law Commission. Nonetheless, Canada welcomed the fact that the Commission had decided to reduce the duration of its sessions to 10 weeks. A longer session might be considered during the final year of the quinquennium.

36. **Mr. Choung-il Chee** (Republic of Korea), referring first to chapter VI of the report, entitled "State responsibility", congratulated the Commission on its outstanding work and said that his Government would submit its written comments on that topic by the deadline of 1 January 1998.

37. Regarding chapter VII, on "International liability for injurious consequences arising out of acts not prohibited by international law", he said that he had often wondered whether that title was accurate, since liability implied a measure of guilt; however, he was prepared to accept it for the time being. On the other hand, he wished to stress how urgent it was for the Commission to adopt the draft articles elaborated on that topic, in view of, in particular, the forthcoming session of the conference on climate change to be held in Kyoto.

38. Referring to the Commission's decision to treat two questions, those of prevention and liability, within the framework of that topic, and, in particular, to make the latter the core issue of its study, he said that he accepted that approach but that, with regard to the first question, the Commission should set its sights slightly higher and discuss the duty of States with regard to prevention. In that connection, too, his Government would submit its written comments in due course.

39. With regard to chapter VIII, entitled "Diplomatic protection", his delegation supported the intended scope of the Commission's study. It was concerned, however, about the problems the Commission might encounter in its consideration and codification of the rule of exhaustion of local remedies, in view of the diversity of national practice in that field. His delegation hoped, nonetheless, that the Commission would be able to produce a uniform codification of the applicable rules in that area.

40. Turning to chapter IX, entitled "Unilateral acts of States", he said that what was of interest in international law was not acts of States in themselves but rather their consequences. Referring to the opinion handed down by the International Court of Justice in 1951 in the Norwegian fisheries case, he said that, while States obviously had freedom to act, the validity of their acts depended on international law and, as such, must be determined by a court or by the affected States, whence the importance of a precise definition of such acts by the Commission. In that connection, he supported deleting the word "legal" from the new title proposed by the Commission, as the term wrongly implied that such acts did not necessarily have legal value in customary international law.

41. Lastly, referring to chapter X, entitled "Other decisions and conclusions of the Commission", he said that the Commission's proposed work programme for the remainder of the quinquennium was too ambitious. In his delegation's view, it would be better for the Commission to confine itself to a limited number of questions on which it could complete its work within the established time-frames.

42. **Ms. Fernández de Gurmendi** (Argentina) said that the importance of the codification of international law on State responsibility and the usefulness of the work so far conducted by the Commission in that area could not be overemphasized. The completion of that work was a priority, and her delegation would make every effort to contribute thereto by submitting its comments to the Special Rapporteur in good time.

43. Her delegation also emphasized the importance of the topic of international liability for injurious consequences arising out of acts not prohibited by international law, the title of which attested to its great complexity. She endorsed the Commission's decision to proceed in stages, and to first consider the question of the prevention of transboundary damage from hazardous activities, and then the question of international liability itself, to determine whether the applicable regime was ad hoc or whether it formed part of the general regime governing State responsibility.

44. Turning to chapter VIII of the report, on diplomatic protection, the institution of the law and legal tradition being of a particular importance and nature in Latin America, she recalled the contribution to the study of that area of law by Messrs. Drago and Calvo, Argentine jurists, who had sought to ensure that diplomatic protection did not serve as a pretext for interference in the internal affairs of States. Recent developments in the international system had in no way diminished the importance of that fundamental concern, which was very delicate in political terms, and conditions for the exercise of which, in particular the rule regarding the exhaustion of local remedies, remained strictly applicable.

45. Recent international events had lent a new dimension to the role and rights of individuals, rendering futile the legal fiction on which diplomatic protection rested and which it was important to keep in mind in reconciling the interests of all the parties involved from the standpoint of the codification of that area of international law.

46. Turning to unilateral acts of States, dealt with in chapter IX of the Commission's report, she said that State practice and international jurisprudence justified codification of the area by the Commission, particularly since it was of particular importance for the legal security and the stability of international relations. The Commission should first clearly define the scope of its study, which should be confined to unilateral legal acts, and should exclude acts which had no legal effects and wrongful acts, which fell under State responsibility. The Commission had rightly set aside for the time being the very different acts of international organizations, leaving open the possibility of reverting to the topic later.

47. **Mr. Pfirter** (Observer for Switzerland) said that the topic of diplomatic protection (chapter VIII) was an area that was very difficult to codify, as had been the experience of the Commission in the past. The analysis of the topic to be undertaken by the Working Group entrusted with the preliminary study gave an indication of the controversies which were likely to emerge, starting with the scope of the topic and the manner in which it should be subdivided.

48. Firstly, with regard to the scope of the topic, the study should not extend to the protection offered to international organizations, so as not to complicate the Commission's task. As for the diplomatic protection of corporations and associations, his delegation still had some doubts and emphasized that differences in practice and doctrine were such that that extremely controversial area was far from being amenable to codification.

49. On the content of the topic, the Commission must ensure that its study on diplomatic protection, a topic limited to the secondary rules of international law, did not extend to the substantive rules of international responsibility. It was in no way necessary, or even possible, to prove internationally wrongful behaviour to justify the exercise of diplomatic protection, contrary to the indication in the Commission's report, since the existence of such behaviour was a substantive problem. The only obligation to be placed on the protecting State was that it must allege an internally wrongful act. Similarly, if nationality or the exhaustion of local remedies were points which undoubtedly related to the diplomatic protection of shareholders and other company officials, the question of establishing whether such persons had a right protected by international law and that of whether that right had been infringed by an international delict were substantive. The same reasoning applied to insurers subrogated for holders of an internationally protected right, as well as in the case, not mentioned expressly, of creditors and trustees.

50. Regarding the heading "Legal persons", which his delegation did not wish to see considered by the Commission, he said that that term referred to corporations and associations under local law and partnerships. It was far from certain that those two categories embraced every kind of legal person. Moreover, under some national legal orders partnerships had no legal personality and were not legal persons.

51. With regard to the heading "Non-nationals forming a minority in a group of national claimants", he asked whether that wording meant that the protecting State would be empowered to endorse claims by either and whether, with regard to a national corporation, it would have the right to intervene on behalf of foreign shareholders of that corporation, which he found disquieting.

52. Turning to chapter IX, on unilateral acts of States, Switzerland approved in principle of the Commission's intention to take up the question. Its conclusions regarding the scope of the topic should have indicated more clearly that the Commission was interested only in acts deliberately intended to create by themselves a normative effect and was thus excluding legal acts, and dependent unilateral legal acts, such as acceptance by a State of a stipulation appearing in a treaty on behalf of another, which were already covered under the law of treaties, and derived unilateral acts able to produce a normative effect but only on the basis of an earlier treaty. That latter category should not be set aside, since it was of undeniable practical interest in the context in particular of the question of the rules of interpretation to be applied to declarations of acceptance of the competence of the Hague International Court of Justice. On the other hand, the decision of the Working Group to exclude unilateral acts by subjects of international law other than States, in particular intergovernmental organizations, seemed sound.

53. He was concerned by the overlapping in the outline proposed by the Working Group on unilateral acts. The wording of the title of chapter IV on the rules of interpretation applicable was too terse and the title of chapter III on other acts was too vague. The heading should include the derived unilateral legal acts which were to be covered.

54. **Mr. Pellet** (Chairman of the International Law Commission) summarized the discussion in the Sixth Committee of chapters VI to IX of the report of the International Law Commission on the work of its forty-ninth session (A/52/10) and on several questions of a more general nature.

55. With regard to the topic of State responsibility, a large number of delegations seemed to think that the work should be completed and the second reading of the draft finished by the end of the quinquennium. That was also the Commission's view. The delegations which had expressed their views on that score had made the same observations as the Commission on the three aspects of the topic which appeared to be the most problematic — crimes, countermeasures and the settlement of international disputes. Some of those delegations had made detailed observations, and he could state with confidence, on behalf of the Special Rapporteur, that their comments would be given careful consideration.

56. With regard to the second topic, international liability for injurious consequences arising out of acts not prohibited by international law, he would simply take note of the

relatively restrained passions which the topic continued to arouse 20 years after its inclusion in the Commission's agenda. After noting that no delegation had challenged the decision to eliminate, as a first step, the aspect of the topic dealing with prevention, he drew attention to the need for guidelines from delegations concerning the other aspects, which must be forthcoming within the following two years; otherwise, he failed to see how the Commission could break out of the impasse in which it had been mired for 20 years.

57. With regard to the new topics, unilateral acts of States and diplomatic protection, he noted, to his satisfaction and relief, that with one exception, no delegation had questioned the appropriateness of studying them. He had taken note of the interest aroused by those topics and did not doubt that the special rapporteurs would pay close attention to the comments, often detailed and quite interesting, which had been made.

58. Turning to the question of the role and functions of the Commission, he took exception to the veiled criticism of the members of the Commission made by one delegation which had questioned their independence. The members of the Commission had given sufficient proof of their independence to be undeserving of offensive remarks.

59. It appeared, moreover, that the fifty-second session of the General Assembly, which had, fortunately, coincided with a colloquium held to mark the fiftieth anniversary of the Commission, had been a fertile source of ideas and constructive proposals regarding the role of the Commission and its relationship to the Sixth Committee, and had even resulted in some promising developments. He congratulated the Secretariat on the success of the colloquium, which would continue in April, with the colloquium to be organized jointly by the Commission, the Geneva Graduate Institute of International Studies and the Government of Switzerland. The second meeting would probably focus more on an examination of the Commission's achievements.

60. Among the positive innovations of the current session, he noted, first, the informal meeting held between members of the Commission and of the Sixth Committee. That experience should be followed up, perhaps even by meetings devoted to specific items on the agenda, as proposed by two delegations. That idea, however, while interesting, might run afoul of the fact that most of the special rapporteurs concerned were absent during meetings of the Sixth Committee.

61. He welcomed the consensus which appeared to be emerging on the need to strengthen the links between the Commission and the Sixth Committee and between the Commission and bodies concerned with the codification and progressive development of international law, including national bodies and scholarly organizations.

62. With regard, once again, to the working methods of the Commission, delegations had made three specific proposals which appeared to enjoy a certain amount of support. The first proposal was to request the Commission and its special rapporteurs to shorten and simplify the questionnaires. While fully aware of the difficulties which some States encountered in answering the questionnaires and the burden which that imposed on them, he emphasized that the topics addressed by the Commission were complex and that short answers to simple questionnaires would not be very useful. General policy questions concerning the approach to be taken to a topic were a different matter. In such a case, the questions could be fairly brief, as it was a matter of getting a sense of States' preferences. Where complex facts were involved, however, the questionnaires would inevitably be complex. Moreover, it was unclear why Governments would hesitate to reply on the ground that they might commit themselves by answering. That argument did not apply in cases where the questionnaires dealt with facts and observable practice, as with the questionnaire on reservations to treaties.

63. The second proposal was to request the Secretariat to translate and circulate in advance chapters II and III of the report of the Commission. That proposal was very useful and could be implemented very easily.

64. The third proposal required an amendment to the Statute of the Commission. In that connection, he emphasized the need to change the method of electing new members of the Commission, and to do so before the end of the current quinquennium, in 2001, so as to avoid overly abrupt changes. He noted, however, that the members of the Commission themselves did not hold unanimous views on the matter.

65. With regard to the duration of the sessions of the Commission and the possibility of holding split sessions, some delegations had stated that the sessions should be proportional to the workload. One delegation had suggested that if the Commission wished to extend its session, it should explain the reasons. While believing that those two requirements were justified in principle, he wondered whether the second one was not based on an erroneous assumption. The Commission's session normally lasted 12 weeks. It was only because of the financial difficulties of the Organization and the relative light workload of the forty-ninth session that the Commission had spontaneously proposed to reduce that session to 10 weeks. The very heavy workload of the fiftieth session amply justified an 11-week session, one week shorter than usual. The fifty-first session

would have an even heavier workload; its calendar, which had been approved by all delegations, contained six sets of draft articles. Thus, while a return to 12 weeks was amply justified, that did not mean that 11-week or 10-week sessions could not be held later, if the workload permitted.

66. With regard to the split fiftieth session, he recalled that the purpose of that initiative had been to ease the pressure on the special rapporteurs during the second part of the session and to facilitate the adoption of commentaries, which generally took place in a hasty and even improvised manner. The split session would also enable all members of the Commission to devote a reasonable period of time to reading those essential and fairly long texts and preparing their replies. In order to test that solution, the fiftieth session would be held in two parts. It was deeply regrettable, however, that the dates and venues had been imposed on the Commission, rather than being chosen by most of its members, which would have been ideal.

67. The Chairman said that the Committee had concluded its consideration of agenda item 147.

The meeting rose at 4.45 p.m.